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Filed July 14, 1917

212 I.A. 632

Gen. No. 6704. April Term 1917. Ag. 27.

C. S. SCHNEIDER and R. L. SCHNEIDER, Partners, etc., Appellants.

vs.

ALBERT F. STEARNS, Appellee.

Appeal from Ford.

Opinion by Thompson, J.

This is a suit in assumpsit begun by C. S. Schneider and R. L. Schneider, against Albert F. Stearns to recover from the defendant fees for services as attorneys at law. The declaration consists of the common counts. A bill of particulars was filed, which states that "plaintiffs' suit is for services in giving advice on each and every day from the 13th day of February, 1913, to the 8th day of March, 1915, to defendant by plaintiffs in reference to the law in regard to the specific performance of an oral contract, which the defendant had entered into with one L. B. Farrar," wherein the said Farrar had agreed to will all of his property to defendant if defendant would take care of him during his life time; and for services in looking up law and laying out plans and giving advice generally. As a result of which defendant obtained real and personal property to the amount of $25,000.00. Total amount of services $5,000.00.

The defendant filed a plea of the general issue and a plea of tender of $200.00. Issue was joined on the first plea and a replication filed denying the tender. A jury returned a verdict in favor of plaintiffs for $200.00, on which judgment was rendered. The

plaintiffs appeal.

C. S. Schneider, one of appellants, testified that the appellee was related to one, Dr. L. B. Farrar and that the appellee on the 13th day of February, 1913, advised with the witness about the validity of a contract between Farrar and appellee, in which Farrar agreed to make a will giving appellee all his property upon condition that appellee would stay with Farrar and take care of him as long as he lived; that Farrar was trying to break the contract, and that there were numerous consultations between appellants and appellee in reference to the matter. Farrar was about 90 years of age and appears to have been addicted to making wills,

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having made one March 15, 1911, another March 29, 1911, a third February 12, 1913, and a fourth on March 8, 1915. The first will gives his property to trustees for the poor of the city of Paxton except a legacy of $500 to defendant. The second changes the first one only to the extent of giving $500 to another relative, and the third gives all the testator's property to appellee on condition that he live with and care for the testator until his death. The last one gives all the property of the testator to appellee unconditionally. He also testified that appellee brought the first three wills to the office of appellants at one time and was advised to and did leave the third with appellants, and that appellee told the

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witness that he had no money but could pay only from what he got out of the estate, that he could not pay a straight fee and the witness told appellee that appellants would take it on a contingent basis, and that the fee would be from one fourth to a half of what appellee got and that appellee said that was all right. He further testified that the appellee advised with him very frequently, between forty and fifty times ,as to what he should do, and that appellee acted under his advice until the death of Farrar.

Appellee testified that he counseled with appellants the first time about the middle of February, 1914, and occasionally thereafter until September of that year, and that on the first two occasions nothing was said about fees but that at a subsequent conference he told C. S. Schneider:- "I cannot pay you anything now but I am a watch maker, earning $20 a week and you will get your money whether I get a cent out of this estate or not"; "that nothing was said about a contingent fee;" that "I asked what this advice was going to cost me and he said 'Oh this little advice won't cost anything as we go along' and then when the final law suit comes we will agree upon a percent and the matter was left right there." A letter written by C. S. Schneider to appellee June 29, 1915, tends to corroborate the evidence of appellee. The evidence tends to show that after Farrar's decease, the date of which however is not shown, his personal estate amounted to $8700, and his real estate was of the value of over $8600.00.

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The will dated March 8, 1915, was filed Nov-

ember 2, 1915, and it is stipulated that it was admitted to probate, but the date when it was probated is not mentioned The appellee, as executor, filed an inventory of Farrar's estate which was approved February 7, 1916.

It was a question of fact and peculiarly within the province of a jury to decide whether there was a contract for a contingent fee of from one fourth to one half of the amount appellee should receive from the estate. The appellee testified that there was no such contract and plead a tender of two hundred dollars in full for the services of appellant. The jury found against appellants on their contention, and under the plea of tender could not do otherwise than return a verdict for the amount admitted to be due, and unless some error of law has intervened, this court should not set aside a verdict where the evidence is so conflicting and the trial court has approved the verdict

Appellants, in making out their case in chief, undertook to prove by R. L. Schneider the usual customary and reasonable charges made by lawyers, where their pay is contingent upon the success of the business they are engaged in. Counsel for appellants at the same time stated that they were relying on the contract. An objection was sustained to the introduction of that offer. It is contended that the ruling

of the court in that regard was erroneous.

If there was a contract which had been performed by appellants on their part, then they were entitled to recover on it, or if they had been prevented by appellee from performing then they could rescind the contract, and recover on a quantum meruit, but there is no contention that they had not performed anything they were retained to do. The appellee had not, when this evidence was offered, given his version as to whether there was an express contract or only an implied one. The evidence offered was merely argumentative of an express contract and was properly rejected. If there was no express contract then appellants would be entitled to recover on a quantum meruit and the fee would not be contingent, the objection was properly sustained for that reason. There was no error in the ruling.

It is also argued that the court erred in giving and refusing instructions. Instruction B requested by appellants was refused. The instruction is, "that where two witnesses testify directly opposite to each other on a mat-

erial point you are not bound to consider the evidence evenly balanced so far as those two witnesses are concerned but that you may regard all the surrounding facts and circumstances and other evidence, if any, and give credence to one witness over the other if you think such facts, circumstances and evidence warrant it". There was no errer in refusing the instruction for

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the reason it does not confine the jury to the consideration of "surrounding facts and circumstances" in evidence but permits the jury to consider any and all facts and circumstances brought to the attention of the jury whether by way of evidence or otherwise.

Appellants complain of the refusal of instruction C, requested by them. It undertook to enumerate to the jury the elements to be considered in determining upon which side the preponderance of the evidence is as to any particular issue. This instruction was given almost verbatim in appellants' second given instruction; it also omitted the number of witnesses testifying on either side concerning such fact from the list of elements to be considered.

It is contended that the first instruction given at the request of appellee is erroneous. This is the stock instruction "that the jury are the sole judges of the credibility of the witnesses and of the weight to be attached to their testimony and you are not bound to take the testimony of any witness as absolutely true and you should not do so if you are satisfied from all the facts and circumstances proved on the trial and all the evidence in the case that such witness is mistaken in the matters testified to by him or that for any other reason appearing from the evidence his testimony is untrue or unreliable." There is no error against appellants in

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the instruction although the word "satisfied" should have been "believe." It was more favorable to appellants than they were entitled to.

It is also insisted that the use of the words "a certain specified percentage" used in appellee's second instruction is erroneous as not based on the evidence, in which the words "from one fourth to a half" was used. The distinction is too fine to affect a jury and if error was harmless.

The fourth instruction told the jury "that the burden of proof is upon plaintiff to prove the alleged con-

tract for a contingent fee by a preponderance of the evidence. If you find that the evidence bearing upon the plaintiff's case is evenly balanced or that it preponderates in favor of the defendant, then the plaintiff cannot recover." Counsel say in their argument, "But to say that the evidence bearing upon the plaintiffs' case is evenly balanced or it preponderates in favor of the defendant is simple nonsense and extremely misleading." The instruction refers to all the evidence in the case and while it might be differently expressed the jury could not be mislead by it.

It is also argued that the case should be reversed because of improper remarks of counsel for appellee made in their argument to the jury. One of counsel stated that the tender made to plaintiff

was more than they had earned but that the tender was made on his advice not because they earned it but he wanted to be friendly with them. The other counsel told the jury that they should remember that defendant has the property by will only; he does not yet know whether or not it is his as the heirs of Farrar have a year from the probating of the will to file a contest and plaintiffs have no right to a contingent fee without showing that the property belongs to the defendant. He may never get a cent of the property. The statements of both counsel were objected to and the objections promptly sustained by the court. The remarks were not pertinent to any issue and not based on any evidence or anything in the record. The objections having been properly sustained and counsel for appellants having the closing argument, we think the jury would not be prejudiced thereby. The judgment will be sustained.

Affirmed.

Gen. No. 6740. April Term 1917. Ag. No. 6.

FRED R. BELL, Appellant,

vs.

H. R. McDONALD, Appellee.

Appeal from Vermilion.

OPINION BY THOMPSON, J.

During the October term 1915, of the Vermilion county circuit court, Fred R. Bell filed a declaration on two judgment notes for $1400 each, with 7% interest, dated May 27, 1915, payable to the order of the Pioneer Stock Powder Co. at Collisons Bros. Bank of Alvin, executed by H. R. McDonald, endorsed to Bell by the payee, by A. G. Letson, etc. president, and by A. G. Letson. H. R. Bell is the only defendant. A cognovit purporting to be signed by H. R. McDonald, the Pioneer Stock Powder Co. and A. G. Letson by an attorney was filed confessing judgment for $3018. Judgment was entered on the confession against "said defendants" for such sum. McDonald, during that term, entered a motion to vacate the judgment and for leave to file pleas.

An order was entered opening up the judgment and granting leave to file pleas. The defendant, McDonald, filed pleas of breach of warranty and failure and want of consideration on which issues were joined. A trial before a jury resulted in a verdict for the defendant McDonald, on which judgment was rendered. The plaintiff appeals.

One of the contentions of appellant is that there is no evidence showing that he is not a holder in due course. The notes were due, one in six months, the other five months after date. Appellant pur-

chased the notes on August 24, 1915, from the Pioneer Stock Powder Co. Appellee is a farmer living near Alvin, Illinois. Appellant was cashier of the Bank of Pence, Indiana, about eight miles from the residence of appellee. These parties had known each other about fourteen years.

Appellee testified that he had known appellant about fourteen years and that about August 10, 1915, appellant called him at his house over the telephone; that the person calling him said his name was Bell and that he had a letter from the Pioneer Stock Powder

Company offering to sell two notes made by him; that appellee told the person who called him, "Don't buy them unless you want to buy trouble for they are not to be paid and their powder is no good whatever." Appellee did not testify that he knew it was appellant or that he know or recognized appellant's voice. Appelle did not call for appellant at the residence or place of business of appellant, but the call came from somewhere to appellee's telephone. The only things in the record that tend to connect appellant with the conversation is that the party at the other end of the telephone line said his name was Bell, and that two weeks thereafter appellant bought these notes. There is no evidence tending to show either that appellee recognized the voice at the other end of the line as that of appellant, or that the speaker at the other end of the line was using a telephone in appellant's place of business or that his given name was the same as that of appellant. The

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evidence was incompetent without some evidence tending to show the speaker was appellant and that is denied by him. Godair vs. Ham. Nat. Bank, 225 Ill. 572. Pumphrey vs. Giggy, 150 Ill. App. 473; Bates vs. Cronin's Estate, 196 Ill. App. 178, 12 Encyc. of Ev. 478.

The evidence shows that appellee was appointed an agent of the Pioneer Stock Powder Co. to sell its wares by a sales agent of said company; that the notes were given as security only for orders that might be made by appellee up to 40,000 pounds. The evidence also shows that the company warranted its goods to be a cure for hog cholera and that the remedy was worthless, and in the few instances where it was used in the neighborhood of appellee the most of the hogs that it was given to died.

It is also contended by appellant that there was no warranty of the remedy by the payee of the notes because the contract was reduced to writting. The only matters reduced to writing were the notes, an order for the remedy, and an agency contract signed by the agent of the payee and appellee. There is a condition printed on the order signed by Doty, the salesman of appellee, that no agreement other than what appears on the face of the order shall bind the Pioneer Stock Powder Company, but it is below the signatures and not referred to in the order and therefore not binding on appellee.

It is further contended that there is no proof that either Doty or Letson, the president of the stock company, was an agent of the compapny.

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The proof is ample that they were agents of the company and that there was a breach of warranty and a failure of consideration.

Error is assigned also on the giving and refusing instructions. The jury were fully and fairly instructed and there is no error in that regard.

For the error in admitting evidence as to what was said over the telephone without requiring some evidence tending to show that appellant was the party at the other end of the telephone, or that the speaker was using a telephone in his office or under his control, the judgment is reversed and the cause remanded.

Reversed and Remanded.

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Gen. No. 6761. April Term 1917. Ag. No. 9.

DORA E. SINGLETON, ADMINISTRATRIX,

etc., Appellee,

vs.

PEORIA & EASTERN RY. CO., Appellant.

Appeal from Vermilion.

OPINION BY THOMPSON, J.

This is an appeal from a judgment for $1750.00 against appellant in a suit brought to recover for the alleged wrongful killing of Orville P. Hatfield. The deceased was struck by a train of appellant at the Oak street crossing of its railway in Danville. The declaration avers that the ordinances of the city of Danville limit the speed of trains within the city to the rate of ten miles per hour, and that the appellant negligently operated its train at a speed in excess of the limit fixed by the ordinances of the city, and also that it failed to give warning of the approach of the train to the crossing by either blowing a whistle or ringing a bell and that deceased was killed while in the exercise of due care.

Oak street runs north and south. The appellant's railroad is a double track system and crosses the street nearly at right angles but slightly northeast and southwest. The deceased, a boy of 19 years of age, was killed by an east bound freight train between six and seven o'clock in the morning of June 19, 1916, while going to work. He got on the tracks of appellant at Harmon avenue, three blocks east of Oak street, and walked on the right of way between the tracks to Oak street,

where he turned south or southeast to cross the east bound track and was struck by the engine and killed. When the train stopped, the body of the deceased was under the sixth car from the locomotive. The evidence is conflicting as to the speed of the train. There is evidence that it was running at the rate of 20 miles an hour and also that it was not running over seven or eight. There is also evidence that an automatic bell was ringing and that no bell was ringing.

The contention of the appellant is that the evidence does not show that the deceased was in the exercise of due care, but that the clear preponderance of the evidence shows that he was not in the exercise of ordinary

care.

The deceased, at the time he was struck, was not a trespasser, he was on the street crossing. He had just ceased being a trespasser. If he had not been previously a trespasser and had used the streets to travel on he would not have been struck by the train. There was no obstruction to prevent him seeing the train approaching. A traveller while walking on a street could not fail to see a train approaching him from either side of a right angled crossing without even turning his head if he was looking straight ahead. His half brother, a boy of 17 years of age. who was walking between the tracks over 100 feet behind him, states that the deceased, when he reached the crossing, turned and was going south east across the south main track, that the witness shouted

to his brother and he turned just as he was struck. Another witness coming towards the deceased testified that he called to the deceased to alarm him and that he looked to his right, made a jump and was struck by the locomotive. The train contained 28 freight cars. The engineer at his post could not and did not see the deceased but saw his hat roll to the south of the train after the boy was struck. The manifest preponderance of the evidence not only fails to show that he was in the exercise of due care but shows that he was killed because of his own negligence. The judgment will be reversed with a finding of fact, that the deceased was not in the exercise of due care when killed.

Reversed.

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Gen. No. 6775. October Term 1917. Ag. No. 15.

THE PEOPLE OF THE STATE OF ILLINIOS,
Defendants in Error,

vs.

MAX BOYDSTON, Plaintiff in Error.

Error to County Court of Morgan County.

OPINION BY THOMPSON, J.

The States Attorney of Morgan county, on April 26, 1917, filed an information in the county court of that county charging that Max Boydston on Sept. 4, 1916, in the county of Morgan "did without lawful excuse, desert, neglect and refuse to provide for Lillian Boydston," his wife, who was then and there in neccessituous circumstances. The defendant plead not guilty. A trial was had before a jury and a verdict returned finding "the defendant guilty of wife abandonment in manner and form as charged in the information." A motion for a new trial was overruled and the defendant sentenced to "pay to the clerk of the court for the use of his wife, Lillian Boydston, the sum of Twenty five Dollars per month, the first payment to be made June 5, 1917, and a like amount on or before the 5th of each month thereafter." It was further ordered that the defendant pay a fine of $15 and the costs; that the fine be paid to his wife; that defendant be released from custody on paying the fine and costs and filing a bond in the sum of $600 and that the defendant be committed to Morgan County Jail until the fine and costs are paid and a bond of $600 be approved by the court.

It is argued on behalf of plaintiff in error that a verdict of

guilty cannot be sustained without a plea by the defendant. The amended record shows that such a plea was entered.

It is also contended that the plaintiff in error is now and at the time of the alleged offence was a resident of Knox county and that the court of Morgan county had no jurisdiction, because plaintiff in error was not personally present in Morgan County. People vs. Johnson, 66 Ill. App. 103, is cited by counsel for plaintiff in error as authority for that contention. That case was decided under the Wife Abandonment Act of 1893. The Wife Abandonment Act of 1903, contains a section repealing

all acts and portions of acts in conflict therewith. In 1915, an act making it a misdemeanor to neglect or refuse, without reasonable cause, to provide for a destitute wife was passed which also repeals all acts and parts of acts in conflict therewith. In People vs. Herrick, 200 Ill. App. 428, it was held that the 1903 Wife Abandonment Act was repealed by the act of 1915, which apparently is the only statute in force providing a penalty for failure to support a wife. There is no substantial difference between these acts so far as failure to support is concerned further than that the word abandonment is not in the present statute and hence abandonment is no part of the offence. The difference, between the act of 1893 and that of 1915, is that the first act provided punishment for abandoment and neglect to provide for the wife, while the last provides a penalty for failure to support without a reasonable cause. There is however no difference in the jurisdictional features of the several acts mentioned. In People vs. Johnson, (Supra), it was held that the venue in a prosecution of this kind

is properly laid in the county where the wife is sent by the husband, no matter where the husband may be residing at the time, and cites Bishop's New Crim. Proc. 53; 1 Bishop Crim. Law 110, and Benfield vs. State, 4 S. E. 869, which support the rule announced.

The evidence shows that plaintiff in error is a line man and has not had employment in any place for any considerable time. After these parties were married they lived in Galesburg, where plaintiff in error had work. He afterwards went to Iowa to work and advised his wife, who was then working in a candy factory, to go and live with his mother in Galesburg. He did not stay long in Iowa. He then went to Michigan. His wife desired that he come to Galesburg and get a place to live and he said no he was going to stay in Michigan. She then said she would go to Jacksonville to her mother, who was sick. Plaintiff in error visited his wife in Jacksonville, in March. They afterwards, at the request of plaintiff in error, met in Peoria, in July and again in September 1916, where they stayed in a hotel. She testifed that she wanted to go back to Galesburg with him, but he said no, he was not home much, and gave her money to return to Jacksonville and that since that time he has neither furnished her any means nor replied to any of her letters.

This evidence tends to show that she was in Morgan county, not because she wished to be there, but for the reason her husband sent her there from Peoria, and visited her there; the venue of the offence was

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properly laid in that county if she was sent there by plaintiff in error.

It is further contended that counsel for defendant in error in their arguments to the jury made improper and inflamatory remarks. Without quoting into this opinion the remarks of counsel as they appear in the bill of exceptions, counsel admit that if such remarks were made they were improper, and while they deny having made the statements attributed to them, and have procured a certificate from the trial judge that some of the statements were not made to the jury, this court must be governed by the record and bill of exceptions which the trial judge has certified is correct, and not by statements outside the record. If there were no other errors in the record, the remarks of counsel alone require a reversal of the judgment.

The information charges that plaintiff in error "did without lawful excuse desert" etc. The offence as defined in the present statute is, that a husband "who shall without any reasonable cause neglect" etc. the term "lawful excuse" in the present statute is only applicable to the failure to support children. The verdict found the plaintiff in error "guilty of wife abandonment." The cause was apparently tried on the theory that the plaintiff in error was guilty of wife abandonment. The Statute of 1915 does not make either desertion or wife abandonment an offence, but it is only neglect or refusal to provide without any reasonable cause, for the support of a wife in destitute or necessituous cir

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cumstances that is made a misdemeanor.

The judgment rendered is also erroneous in not fixing any limit to the time the payments are to be made to the wife or to the time of imprisonment as is required by the statute.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

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Gen. No. 6779. October Term 1917. Ag. No. 75.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

RAY O. LUDWICK,
Plaintiff in Error.

Error to County Court of Champaign.

OPINION BY THOMPSON, J.

The plaintiff in error was by the grand jury of Champaign County, at the January Term of the circuit court, indicted for selling intoxicating liquor within the town of Champaign while said town was anti-saloon territory. The indictment consists of five counts and each count avers that the plaintiff in error had, prior to the commission of the offences charged, been convicted in said county of violating the anti-saloon act.

The indictment was certified to the county court, where on a trial before a jury the plaintiff in error was found guilty under the second and fifth counts. He was sentenced to pay a fine of $150 on each of said counts and also sentenced to the county jail for ten days on each count, the confinement under the fifth count to begin at the expiration of the confinement under the second count. Plaintiff in error has sued out a writ of error to review that judgment.

The evidence shows that plaintiff in error and one. Clarence Lingreen, had resided in the same house for several years and that a United States Retail Liquor Dealers License, had been issued to

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Ray O. Ludwick and Clarence Lingreen at the premises so occupied by them. The original Revenue Stamp was introduced in evidence. It is insisted that the court erred in admitting a certified copy of the Internal Revenue Stamp for the reason that the original had already been offered in evidence. The original stamp, No. 20258, bears date July 10, 1916, and recites:—"Series of 1916, Received from Ludwick & Lingreen, the sum of Twenty-five dollars for Special Tax as Retail Liquor dealers * * at 108½ E. Church, Champaign." The certificate of the collector of the Springfield Internal Revenue office shows that certificate No. 20258 was issued to "Ludwick & Lingreen, Ray Ludwick, Clarence Lingreen, Retail Liquor dealer, Champaign, Ill.", July

10, 1916. The original stamp only gives the name of "Ludwick & Lingreen" as the holder of the stamp, while the records of the Internal Revenue office give the individual names of the applicants for the license issued to "Ludwick & Lingreen." The records of the Internal Revenue office were competent evidence, if the original stamp had not been introduced, People vs. Joyce, 154 Ill. App. 13. There was no necessity for producing both but there was no predudicial error in their admission since the records of the office give the names of the individuals and identified the plaintiff in error as one of the parties to whom the stamp was issued.

It is also insisted that there was no proof that the Town of Champaign is anti-saloon territory. The people offered in evidence

a certificate made by Henry King, who testified that he is the town clerk and custodian of the records and files of the office of the town clerk of the town of Champaign. The certificate shows that at a vote in July 1908, the town of Champaign became anti-saloon territory. It was competent evidence of the fact that the town of Champaign was anti-saloon territory. People vs. Danley, 181 Ill. App. 89. It is also contended that there is no competent evidence showing that King was town clerk. The fact that King was acting as clerk and custodian of the office was sufficient proof that he was the town clerk. 9 Encyc. of Ev. 182; 29 Cyc. 1389.

It is also insisted that the court erred in admitting the records of former convictions of plaintiff in error of a similar offence. The records admitted show that he was convicted once by jury and at another time he plead guilty to an indictment for selling liquor in anti-saloon territory. The indictment alleged former convictions. The statute provides for an increased penalty upon a second conviction. There was no error in the admission of such records.

The plaintiff in error requested an instruction informing the jury that "The jury on a criminal case are by the Statutes of Illinois made **judges of the law and the evidence** and under these statutes it is the duty of the jury, after hearing the arguments of counsel and instructions of the court, to act upon the law and facts according to their best judgment of such law and facts." The wording of the statute is:—"Juries in all criminal cases shall be **judges of the law and facts"** and this has been

modified by judicial construction, by adding to it that the jurors should accept the law as given to them by the court, unless they can say under their oaths that they know the law better than the court. Juretich vs. People, 223 Ill. 485; Mullinix vs. People 76 Ill. 211. The instruction is not in the language of the statute and misleading. Had it been in the language of the statute it should be modified as indicated by the Supreme Court. There was no error in refusing it. There is no error in the case, the judgment is affirmed.

Affirmed.

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Gen. No. 6733. October Term 1917. Ag. No. 13.

LESTER BLACKWELDER, Defendant in Error,

vs.

WILLIAM J. JACKSON, RECEIVER, ETC.,
Plaintiff in Error.

Error to Montgomery Co.

OPINION BY THOMPSON, J.

This is an action brought by Lester Blackwelder against William J. Jackson, receiver of the C. & E. I. Railroad, to recover damages for his expulsion from a passenger train of the defendant at Lennox, Illinois, and for personal injuries averred to have been received at the time of such expulsion. On a trial before a jury the plaintiff recovered a verdict for $250 on which judgment was rendered. The defendant prosecutes this writ of error to review the judgment.

The declaration contains five counts, which aver that plaintiff at St. Louis, on the morning of December 25, 1916, became a passenger on defendant's train and paid his fare to Hillsboro, Illinois; that the conductor demanded additional money for the fare and accused plaintiff of stealing some money, which the conductor had laid upon a seat by the side of plaintiff and demanded a return of such money and on plaintiff's refusal, either to pay additional fare or to return the money said to have been placed on the seat, the conductor and porter forcibly ejected plaintiff from the train and the porter struck plaintiff over the head with a revolver, beat and kicked plaintiff and severely injured him, etc.

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The evidence shows that plaintiff and three other young men, who live in Witt, Illinois, went to St. Louis, the day before Christmas to spend Christmas Eve, and that the next morning they went to the depot to take a train for home, but did not get there until the train was due to leave. Plaintiff appears to have been the financier for the crowd and testified he asked how much the fare was to Hillsboro and was told $5.90 but they would miss the train if they stopped to get tickets, that they would have to run to catch the train and they got on the train without tickets saying they would pay on the train. There is a dispute as to what occurred on the train. There was a controversy between the conductor, an elderly man who had held that position 17 years and the

plaintiff, which occupied much of the conductor's time between stations, the conductor demanding $7.40 the interstate rate and the plaintiff and his companions arguing the fare was $5.90. The dispute, in which much vile language was used, continued past the first station, Cramte City, and the conductor told them that they would have to get off at the next station, if they did not pay the fare. The result was that at Lennox, which was the next station, plaintiff refused to get off and he was ejected while refusing and resisting such expulsion. Plaintiff claims that the porter drew a "big gun" and hit him with it on the left side of the head, and that some one kicked him on the back of his head as he went down the car steps. The plaintiff, a coal hauler, claims he was

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so injured that he was unable to work until January 3d, and from February 7th to March 13th.

The evidence of plaintiff, that he was struck and kicked or abused, is denied by the employees of defendant and others but as the case must be reversed for errors of law and there may be other evidence at another trial, we forbear to express any opinion concerning the facts.

The plaintiff consulted a physician the next morning, who dressed a wound on plaintiff's head. The doctor testified that there was a bruise on the side of his head about an inch in circumference; that the skin was not broken but was only bruised, and that at the back of the head there was a break in the skin about three quarters of an inch long.

The doctor, after describing the wound at the side of the plaintiff's head, was asked, among other questions as to what caused the wound:—"In your opinion, Doctor, as a physician what character of an insrrument was it with reference to whether it was caused by a blunt or sharp instrument?" The court overruled an objection to the question, and he answered, I would think it would be a blunt one. The object of this proof was to corroborate the evidence of plaintiff that he was struck by the porter with a revolver.

It was a controverted fact whether plaintiff was struck with a

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revolver. The wound was a mere bruise. It was of such a nature that a doctor would not know

what it was made by any better than any ordinary person. "The matter involved no particular science, skill or knowledge in order to formulate the opinion given." The evidence should have been confined to a description of the bruise. To admit such testimony was to permit the witness to usurp the province of the jury and to testify to a fact which was to be determined by the jury, which all the authorities agree is not permissible. I. C. R. R. Co. vs. Smith, 208 Ill. 608; City of Chicago vs. Kidier, 227 Ill. 571; Kimbraugh vs. Chicago City Ry. Co., 272 Ill. 71. The admission of such evidence was error.

Five of the instructions given to the jury at the request of plaintiff concern the question of exemplary or vindictive damages. One instruction was sufficient on that question. The frequent repetition of instructions on any question is liable to mislead the jury into the belief that the court has an opinion that the party is entitled to such damages. Kahl vs. C. M. & St. P. R. R., 125 Ill. App. 294.

In the fourth instruction given at the request of plaintiff, the jury were informed that if they found for plaintiff, it was not necessary that any witness should have expressed an opinion as to the amount of such damages. That is a correct rule as to pain and suffering but as to doctor's bills and damages of that nature, the evidence must show

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the amount and as to loss of time there must be evidence as to the time lost and its value. Other instructions are erroneous in assuming facts without requiring them to be found from the evidence and others simply announce abstracts propositions of law.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

(Page 5)

Filed April 19, 1918.

7 a

212 I.A. 633

Gen. No. 6786. October Term 1917. Ag. No. 21.

GEORGE W. ROSEBRAUGH, CONSERVATOR OF LULA SIZEMORE, Appellant.

vs.

CHARLESTON STATE BANK AND FRED G. HUDSON, TRUSTEE, Appellees.

Appeal from Coles.

OPINION BY THOMPSON, J.

This is a bill in chancery, filed by George W. Rosebraugh, conservator of Lula Sizemore, against Fred G. Hudson, trustee, and the Charleston State Bank to obtain a construction of a mortgage, and thereby determine whether the complainant or the Charleston State Bank is entitled to $3238.84 now in the possession of Fred G. Hudson as trustee. The case was heard by the court on bill, answers, replication, a stipulation of facts, and a note and a deed that were offered in evidence. The trustee is neutral and disinterested. The court entered a decree in favor of the Charleston State Bank. The complainant appeals.

John M. Glassco had been the conservator of Lula Sizemore. He resigned the office of conservator in January 1914, and George W. Rosebraugh was appointed his successor. W. K. Shoemaker and W. O. Glassco were the only sureties on the bond of John M. Glassco as such conservator. James Shoemaker had died testate owning 188 acres of land; by his will, admitted to probate in 1901, he gave his wife, Tabitha, who survived him, the use of all his real estate during her

life time. He left three children surviving him, Ella Glassco, who is the wife of John M. Glassco, W. K. Shoemaker and J. S. Shoemaker, who were tenants in common, each owning an undivided third interest in the remainder in fee in the 188 acres subject to mortgages of $2500 and $10,000 and the life estate of Tabitha Shoemaker.

On December 13, 1913, Ella M. Glassco and her husband, John M. Glassco, conveyed to W. K. Shoemaker and W. O. Glassco the undivided third interest of Ella M. Glassco in the lands inherited from the father of Ella M. to secure them as sureties on the bond of John M. Glassco. When John M. Glassco resigned as conservator, he

owed the estate of his ward $7936.25, for which sum his successor on January 13, 1914, took a judgment note signed by William O. Glassco and W. K. Shoemaker, due on or before March 1, 1915, with interest at six per cent per annum, secured by a real estate mortgage dated January 13, 1914, recorded January 14, 1914, executed by W. O. Glassco with his wife, William K. Shoemaker with his wife and Tabitha Shoemaker on "all our undivided interest conveyed to us by Ella M. and John M. Glassco in the following described lands, to-wit":—(the lands described are the lands of which James S. Shoemaker had died seized.) Rosebraugh as conservator also took a judgment note for $1500 from William O. Glassco, W. K. Shoemaker and Tabitha Shoemaker as additional security for the $7936.25 note, which was not signed by Tabitha Shoemaker.

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On January 26, 1914, W. K. Shoemaker executed a note for $4668, with mortgage securing the same, to F. N. Todd as trustee for the Charleston State Bank on his interest in the said lands, and Tabitha Shoemaker, who was surety on his notes at the bank, joined in this mortgage. The mortgage was recorded the day it was executed.

Afterwards on February 7, 1914, all the parties interested in the said lands joined in a deed conveying them to Fred G. Henderson as trustee to sell the same, and pay out the proceeds to the parties entitled thereto.

The trustee sold the lands. He paid, from the proceeds, the original mortgages of $12,500. There was also realized from the life estate of Tabitha Shoemaker $4858.26, and from the third interest in the remainder of Ella M. Glassco that had been conveyed to W. K. Shoemaker and W. O. Glassco $4026.00. The trustee paid to appellant on the note signed by W. K. Shoemaker and W. O. Glassco $5645.42 composed of $4026.00 that was realized from the sale of the interest in the land that had been originally owned by Ella M. Glassco and $1619.42 being one third of the amount realized from the sale of the life estate of Tabitha Shoemaker in all the land. The trustee still holds $3238.84 being two thirds of the amount realized from the sale of the life estate of Tabitha in said lands.

The stipulation states that there is still due the Charleston

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State Bank on the note and mortgage to F. N. Todd trustee, and to Rosebraugh conservator on the note and mortgage held by him, to each a sum in excess of the money remaining in possession of Hudson, the trustee. The appellant claims that Tabitha Shoemaker, by joining in the mortgage executed by W. K. Shoemaker and William O. Glassco, on the undivided third interest had been conveyed to them by Ella M. Glassco, mortgaged her life estate in said third of said lands together with her life estate in the other two thirds to secure the balance due on the note taken by the new conservator. Appellee insists that by joining in said mortgage, as the same is worded, Tabitha Shoemaker only mortgaged her life interest in the third that had originally belonged to Ella M. Glassco.

After the recording of the mortgage to Todd, trustee for the bank, the conservator took judgment on the $1500 note against W. K. Shoemaker, W. O. Glassco and Tabitha Shoemaker. William O. Glassco owned no interest in any of said land other than that which had been conveyed to him and W. K. Shoemaker to secure them as sureties for John M. Glassco. The mortgage executed by W. O. Glassco, W. K. Shoemaker and Tabitha Shoemaker states that the mortgagors mortgage to George W. Rosebraugh **"all our undivided interest conveyed to us by Ella M. Glassco and John M. Glassco** in the following described lands to-wit:"— * * *. "An undivided one third interest" in the described lands was all that had been conveyed to W. K. Shoemaker and William O.

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Glassco. Nothing had been conveyed to Tabitha Shoemaker. She had the use for life of the interest that had been conveyed to W. K. Shoemaker and William O. Glassco. While W. K. Shoemaker owned another undivided third interest in the remainder in fee in the described lands, clear of encumbrances as far as shown by this record except the $12,500 in mortgages against the combined interests and subject to the life estate of his mother Tabitha, appellant makes no claim that the mortgage given to him by W. K. Shoemaker covered any part of the interest of W. K. Shoemaker except the one sixth interest in remainder conveyed to him by Ella M. Glassco to secure W. K. Shoemaker as a surety on the bond of John M. Glassco. Counsel for appellant in their argument say "the parties intended to

and did refer to the deed conveying an undivided one third subject to the life estate made by Ella M. Glassco and husband to W. K. Shoemaker and W. O. Glassco" *** "It was very natural for him (W. K. Shoemaker) to want to save his own interest, to protect and satisfy his own debts." W. K. Shoemaker was, so far as his mother Tabitha was concerned, the real debtor; she was only a surety. Appellant makes no claim against the interest of W. K. Shoemaker, the real debtor. Tabitha Shoemaker had a life estate in the undivided third in remainder conveyed to W. K. Shoemaker and W. O. Glassco. She also had a life estate in the undivided two thirds in remainder owned by W. K. Shoemaker and J. S. Shoe

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maker. By joining in a mortgage on the "undivided interest conveyed to us by Ella M. and John M. Glassco" she only mortgaged her life estate in the undivided third in remainder that Ella M. had conveyed to W. K. Shoemaker and W. O. Glassco to secure John M. Glassco's debt. The appellant himself placed that construction on the mortgage by entering up a judgment on the $1500 note after the mortgage to appellee executed by W. K. Shoemaker and Tabitha Shoemaker had been recorded. We see nothing to construe. The mortgage clearly only mortgages the life estate and the fee in the undivided one third conveyed by the deed of Ella M. Glassco to W. K. Shoemaker and W. O. Glassco. If there is any doubt in the case it is whether Tabitha Shoemaker by joining in the mortgage conveyed anything as nothing had been conveyed to her, but the parties all concede that it was intended to cover one third of her life estate. There is no error in the decree and it is affirmed.

Affirmed.

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Filed April 19, 1918

8

Gen. No. 6789. October Term 1917. Ag. No. 24.

JOHN H. POWERS Appellee,

vs.

THE ESTATE OF MARY ELLEN MURRAY, DECEASED, Appellant.

Appeal from Vermilion.

OPINION BY THOMPSON, J.

At the December term 1916, of the probate court of Vermilion county, John H. Powers presented a claim for $6213.00 against the estate of Mary Ellen Murray. The claim consists of two notes.

One of the notes is for $5000 and is dated at Danville, May 15, 1910, payable three years after date to the order of John H. Powers, with interest at 6 per cent per annum and is signed "Mary E. Murray." There are five endorsements of interest paid. The first endorsement is "May 15, 1911, $300, interest paid on this note to date. Elizabeth Powers." The other endorsements are identical except they are for successive years and are signed "Elizabeth Mercer", the last payment being May 15, 1915.

The other note is for $1000 and is dated at Danville, May 15, 1911, payable two years after date to the order of Elizabeth Powers with interest at six per cent per annum and is signed "Mary E. Murray." This note is endorsed "Elizabeth Powers." There are also four payments endorsed on this note. The first is:—"May 15th. 1912, $60 interest on this note to date Elizabeth Mercer." The second is a similar endorsement for 1913. The third is $160 interest a nd princi

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pal paid in 1914 and the last is $254 interest and principal paid in 1915.

The claim was heard in the probate court at the January term, 1917, and allowed in the sum of $6281.40. An appeal was perfected to the circuit court where the claim was heard before the court without a jury at the May term 1917, and allowed in the sum of $6281.40 to be paid in due course. From that judgment the administrator has perfected an appeal to this court.

On the trial, the appellee introduced the notes in evidence. The appellant then called Mrs. Elizabeth Mercer as a witness and proved by her that she was formerly Elizabeth Powers; that she is the mother of the claimant, who lives in New York; that the notes, except

the signatures thereto are in her writing; that she acted for her son in taking the notes, and in collecting the payments made, and made the endorsements. In reply to a question asked by counsel for appellant she answered "Whenever she paid the interest I gave her credit before her."

Appellant then called as a witness Mr. Phillips, the manager of a Danville Loan Association, who testified that on December 10, 1910, the Association made a loan of $13,000 to Ellen Murray, $8,500 of which was used to pay off an old mortgage and the balance was paid in the presence of Mrs. Murray by a check to Mrs. Powers at the request of Mrs. Murray; that Mrs. Powers did not have any notes there; that he asked "where the

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notes were that this was to take up and Mrs. Murray's reply was, 'that Mrs. Mercer didn't have the notes and she said she and the Rudolph family were friends and she would take care of that."

The appellee then called Mrs. Mercer, as a witness in rebuttal. She testified over objection that the $4,500 was not a payment on the $5000 note but was given in payment of two notes, one for $3000 and one for $1500, that she handed to Mrs. Murray just as they went into the Loan Association Office that Mrs. Murray owed to Mrs. Rudolph, her mother, that she deposited the money in a bank, and afterwards put it in the Webster Building and Loan Association for her mother and herself. Appellee also called a Mr. Webster, the secretary of a Building and Loan Association, and proved by him over the objection of appellant that on December 17, 1910, Mrs. Mercer paid $4500 to that Building and Loan Association for stock issued to Mrs. Rudolph and that prior to that time Mrs. Mercer had shown him some notes—more than one note—that were about to be taken up.

It is contended on behalf of appellant that the court erred in admitting any of the evidence presented by appellee in rebuttal. The argument is that Mrs. Mercer, as the agent of appellee, collected the $4500 check of December 10, 1910, and that she was the endorser of the $1000 note; that she would be liable over to her principal, both as agent and endorser; that therefore she was directly interested in the event of the suit and an incompetent witness for claimant, and that the evidence of Webster was concerning things inter alois and merely

argumentative.

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The fact that Phillips testified as to the making of the $4500 check to Mrs. Mercer for money due Mrs. Murray on the loan from the Loan Association would not render Mrs. Mercer a competent witness against Mrs. Murray's estate. Under Section 2 of the Evidence Act, no person directly interested in the event of any civil suit or proceeding shall be allowed to testify in his own behalf when the opposite party sues or defends as the administrator of a deceased person except in five enumerated exceptions. The fourth exception is the only one under which any claim can be made that Mrs. Mercer could be a competent witness and that relates only to conversations. Phillips was not an agent of the deceased nor a party in interest. The conversation he testified to was in the presence of Mrs. Murray. That exception to render Mrs. Mercer a competent witness requires that the conversation testified to shall have occurred in the absence of the deceased. Under this exception the evidence of Mrs. Mercer in rebuttal should not have been admitted. Feitl vs. Chicago City Ry. Co., 211 Ill. 284.

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The check for $4500 was given December 10,1910, the $1000 note was executed by Mrs. Murray, May 15, 1911. We fail to see how a check given several months before that note was executed could be a payment on that note.

The note for $5000 was dated May 15, 1910, and was not payable until three years after its date. There was nothingdue on it December 10, 1910, and Mrs. Murray did not have the right to pay it, neither had Mrs. Powers, now Mercer, even if she was the agent of appellee, the right to accept any payment, except interest as it matured, before the maturity of the note. Mrs. Murray appears to have lived more than two years after the maturity of the note. There are five credits for the payment of the interest on this note after the giving of the check which appellant claims was a payment on that note. In addition to what has been said Mrs. Mercer, when a witness for appellant and in reply to a question propounded by counsel for appellant, answered, "Whenever she paid the interest I gave her credit for it before her." Mr. Phillips testified that he asked where the notes were that the $4500 was to be applied on and Mrs. Murray's reply was that Mrs. Powers did not have

the notes. The evidence in the case introduced by appellant with the notes, not considering the evidence offered in rebuttal, shows without a doubt that the $5000 note had not been paid by Mrs. Murray. She made five payments of annual interest after the giving of the

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check, which it is now claimed was a payment, and saw them endorsed on her note.

The rule is in a suit at law, "where a cause is tried before the court without a jury and there is enough other testimony of unquestioned competency sufficient to sustain the finding of the court it will not be disturbed, notwithstanding the fact that incompetent evidence has been received, because the same harmful and erroneous effect does not follow as when the admission of such evidence is before a jury." Grand Pacific Hotel Co. vs. Pinkerton, 217 Ill. 61; Palmer vs. Meriden Britannia Co., 188 Ill. 508; Kreiling vs. Novtrup, 215 Ill. 195; Partridge vs. Ryan, 134 Ill. 247; Merchants' D. Tr. Co. vs. Joesting, 89 Ill. 152.

It is not necessary to pass upon the question whether the evidence introduced by appellee in rebuttal was or was not competent since the competent evidence fully sustains the judgment, which is therefore affirmed at the costs of appellant to be paid in due course.

Judgment Affirmed.

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Filed Apr. 12, 1918

Gen. No. 6803. October Term 1917. Ag. No. 36.

CHILDERS & LILLIENSTEIN, Appellee,

vs.

ILLINOIS CENTRAL R. R. CO., Appellant.

Appeal from Sangamon.

OPINION BY THOMPSON, J.

Appellee recovered a judgment for $800 against appellant in a suit begun to recover damages for injury to six horses caused by the negligence of appellant in failing to safely carry them to East St. Louis.

The evidence, and the theory on which appellee tried the case as appears from its instructions, show that a written shipping contract was made by the parties on May 26, 1916, at El Paso, Illinois, under which a car load of horses was billed to East St. Louis, with the right to stop and fill in at Springfield.

The bill of lading was neither introduced in evidence nor any reason given for the failure to introduce it. At the close of all the evidence appellant requested a peremptory instruction which was refused.

If a written contract is shown to have been entered into between the shipper and the carrier, the shipper cannot maintain an action against the carrier with respect to any matter touching the shipment, if he fails to introduce the contract in evidence. In

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an action for injuries it is uncumbent upon plaintiff to introduce the contract in evidence. Finkelstein vs. Ill. Cent. R. R., 198 Ill. App. 76; Kitza vs. Oregon S. L. R. R. Co., 169 Ill. App. 249; Burtless vs. Oregon S. L. R. R. Co., 180 Ill. App.. 249. The judgment is reversed and the cause remanded.

Reversed and Remanded.

Filed April 19, 1918

101

212 I.A. 634

Gen. No. 6805. October Term 1917. Ag. No. 38.

E. B. CONOVER, ET AL., TRADING AS THE E. B. CONOVER GRAIN COMPANY FOR THE USE OF THE CHATHAM ELEVATOR CO., Appellees,

vs.

CHICAGO & ALTON R. R. CO., Appellant.

Appeal from Sangamon.

OPINION BY THOMPSON, J.

E. B. Conover, John McHenry and A. J. Jones were partners engaged in buying and shipping in central Illinois, under the firm name of the E. B. Conover Grain Co. The Chatham Elevator Company is a farmer's elevator that shipped grain from Chatham, in Sangamon county, Illinois. The Chatham Elevator Company had sold corn in advance of its delivery to the E. B. Conover Grain Company. On February 29, 1916, the Chatham Elevator Company shipped a car load of shelled corn to its own order at Peoria, Illinois, over the defendant railroad. At Peoria the car of corn was delivered to the E. B. Conover Grain Company and by it reshipped to its own order at Baltimore, Maryland, over the defendant railroad. The E. B. Conover Grain Company brought this suit for the use of the Chatham Elevator Company against the defendant to recover damages claimed to have been sustained by the negligence of the defendant.

The declaration contains one count and avers that plaintiffs delivered a car of grain, to-wit, at Sangamon County, Illinois, to the defendant for transportation to Baltimore, Maryland, that it became

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the duty of defendant to carry the grain within a reasonable time and to use due care in caring for said grain and not to permit it to heat or otherwise deteriorate; that the defendant failed to deliver the grain within a reasonable time in as good condition as when received by it, but negligently permitted the grain to heat and spoil and otherwise deteriorate in quality. The bill of particulars filed with the declaration describes the car as CV-No. 61719, and describes the claim as "Loss caused by damages and deterioration and in transit $275.41.

The car contained 65800 pounds of corn that was graded as No. 4 corn. The contents of this car were

transferred in route by the carrier into a N. Y. C. & St. L. car and arrived at Baltimore, May 10.

The evidence tends to show that there was a loss from the car of 4030 pounds of corn and that the corn was in good condition when delivered to the carrier and that by the length of time it was in route it heated, rotted and deteriorated very much in quality.

Appellant contends (1) that the court erred in refusing to admit evidence offered by it of a great congestion and blockade of cars loaded with grain at Baltimore and on railways entering that city, which prevented the prompt transit of the grain in question, and that these circumstances were beyond the control of appellant and caused the delay and deterioration; (2) that the court adopted an improper measure of damages and (3) that the court admitted improper evidence of notice of

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claim for damages that is required by the bill of lading.

The rulings on the first two questions were similar to those in Conover vs. Wabash Ry. Co., (opinion filed by this court Dec. 1, 1917,) which were there held to be correct. There was no error in such ruling in this case.

On the remaining question the bill of lading contained the same provision regarding notice as was in the bill of sale in the case of Conover & Co. vs. Baltimore & Ohio S. W. R. R. Co., (in which an opinion is filed herewith.) In this case appellee called a witness who testified that a written notice of claim for damages was filed with appellant July 6, 1916, over an objection that the evidence offered was not the best evidence and therefore incompetent. This court reviewed the propriety of this ruling in the Conover Co. vs. Baltimore & Ohio S. W. R. R. case, in which the evidence differed from the evidence admitted in this case only in that the witness did not testify that a written notice was given although the notice required was a written one, and it was there held that the witness in testifying that a notice was given was testifying to a conclusion as to contents of the notice given and that the evidence was secondary and erroneous. The notice should have been produced or a legal reason shown why it could not be produced. The court erred in overruling the objection. The judgment is reversed because of that error and the cause remanded.

Reversed and Remanded.

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Gen. No. 6806. October Term 1917. Ag. No. 39.

CHATHAM ELEVATOR CO., Appellee,

vs.

CHICAGO & ALTON R. R. CO., Appellant.

Appeal from Sangamon.

OPINION BY THOMPSON, J.

The Chatham Elevator Company brought this suit against the Chicago & Alton R. R. Co. to recover damages claimed to have been sustained on four loads of shelled corn shipped from Chatham, Sangamon County, Illinois, over the defendant railway, consigned to Baltimore, Maryland. The plaintiff recovered a verdict and judgment for $332.35; the defendant appeals. The damages claimed are for deterioration in quality caused by the long and unusual time that the grain was in transit. Three of the cars were from 80 to 88 days in transit, the fourth was 15 days. The questions presented for review are identical with the questions presented in Conover vs. Wabash R. R. Co. (Opinion filed by this court Dec. 1, 1917) with the further question, that the court erred in admitting oral testimony of the presentation of a notice in writing of a claim for damages as is required by a condition in the bill of lading. This case is governed by the rules of law announced in Conover vs. Wabash R. R. as to all questions presented in that case. It is unnecessary to again review those questions. There was no error in any question argued concerning damages claimed for deterioration.

The court permitted the appellee to prove by oral testimony over

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objection made by appellant that a written notice of claim for damages for each car wes given to appellant within four months from the date of delivery of the corn at Baltimore. The error, however, was harmless for the reason that under the proviso in the Cummins amendment to the Carmack Amendment to the Interstate Commerce Act, no notice can be required as a condition precedent to recovery, where the only damages sought are caused by delay or where the property is damaged by negligence in transit. Conover & Co. vs. Baltimore & Ohio S. W. R. R., (Opinion filed herewith.) There is no reversible error in the questions presented for review; the judgment is affirmed.

Affirmed.

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212 I.A. 534

Gen. No. 6820. October Term 1917. Ag. No. 51.

THELIA VILITIS, Appellee,

vs.

ADAM HOFF AND J. D. HUBER, Appellants.

Appeal from Sangamon.

OPINION BY THOMPSON, J.

This is an appeal from a judgment for $400 against the defendants in an action of trespass.

A motion for a change of venue from the trial judge for the reason that he had been counsel for plaintiff was made by the defendant Huber. An affidavit was filed stating that the trial judge had been a member of the firm of Smith & Friedmeyer that began the suit and filed the declaration. The record does not show that the other defendant joined in the application or consented thereto. Section 9 of the Change of Venue Act requires that when there are several parties, all must join in the application or consent to it. There was no reversible error in the ruling since the other defendant did not consent to or join in it.

The evidence shows that Huber had sued out a writ of replevin before a justice of the peace in favor of the Jones Furniture Company against the husband of appellee, for a stove on which there was a balance of ten dollars due. The writ was delivered to appellant, Hoff, a constable, to serve. He went to the residence of appellee and her husband to serve the writ. Appellant Huber and one, Comber, accompanied the constable to identify the stove. Appellee is a Lithuanian

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and cannot speak English. When they arrived at her residence they were admitted by some children but she was not at home. She was sent for and came in a few minutes. Appellee, the children, and appellants were then in the house. The writ was explained to her by an interpreter. She contended that they had no right to take the stove and refused to let them take it. Appellants asked appellee where her husband was and she told the children not to tell. They then started to take the stove, when appellee pushed them away and seized a club to strike them. This was taken from her, she then grabbed a pitcher as a weapon in place of the club. Some of the parties tried

to hold her while the other took the stove, but it took two of them to hold her and the other could not move the stove alone, so that they were unable to take the stove and had to leave without it. She claims to have suffered injury in the struggle.

The appellants had a lawful writ and were entitled to take the stove under it. The appellee was not justified in resisting the serving of the writ, and any injury she received so far as appears from the evidence was caused by the necessary defence of appellants from the unlawful assaults of appellee and her unlawful resistance to the serving of the writ. The judgment will be reversed with a finding of fact that appellee was the aggressor and appellants acted only in their own defence.

Judgment Reversed.

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Gen. No. 6828. October Term 1917. Ag. No. 57.

IN RE ESTATE OF JOHN WARNER, DECEASED, ISABELLA R. WARNER, ET AL., Appellants.

212 I.A. 334

vs.

VESPASIAN WARNER, EXECUTOR OF APPELLEE.

Appeal from DeWitt.

OPINION BY THOMPSON, J.

Vespasian Warner, as executor of the last will of John Warner deceased, in December 1916, presented a petition to the county court of DeWitt county stating that L. O. Williams and F. K. Lemon, attorneys, had been employed by him as such executor and had rendered certain enumerated services to the estate and asking that the court fix their compensation. The court heard evidence and fixed the compensation at $3000.00. Some of the heirs appealed from that order to the circuit court, where upon a hearing that court made a similar order. The same heirs again appeal to this court.

The evidence shows that at the May term 1911, of the county court of DeWitt county,appellee filed an executor's report in the estate of John Warner amending a former report filed in January 1907, covering the time from January 1906 to January 1907. Additional reports were filed in 1909, 1911 and in April 1914. There are no additional credits in either of the last two reports but only disbursements. The total credits as shown by the second report amounted to $980,235.99 and

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the total disbursements under all the reports amounted to $956,599.11.

Objections were filed to various items in each of the reports. The attorneys fees allowed and in controversy on this appeal were for services rendered by the attorneys on the hearing of the objections to these reports. The objections which were insisted upon and disposed of on the hearing covered sums amounting to $111,724.11, and there were objections withdrawn on the hearing to other sums amounting to about $60,000.00

Amongst the objections overruled are those to twenty four items composed of sums varying from $50 to $11,000, amounting in all to $44,003.43 which appell-

ants insisted the executor had received and had failed to credit to the estate.

The executor also credited himself, and charged the estate with $58,814.15, commission at 6% on the personal estate. Appellants contended that the executor was not entitled to any commissions because of alleged "fraud" and "scandalous conduct" on the part of the executor in the management of the estate. The county court reduced the commissions of the executor to $45,-240.65 thus sustaining objections to $13,573.47 of the claimed commission.

This reduction was made by sustaining objection to the allowance of any commission on two items amounting together to $176,090.26 and by reducing the commission on $60,000 of government bonds from six per cent to one per cent.

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Objections were also sustained to a number of items amounting in the aggregate to $5075.22. These items were substantially all composed of payments made in the case of Warner vs. Warner, 235 Ill. 488, which was a suit in chancery, involving the rights of Isabella Warner, the widow of John Warner, in her husband's estate, begun by her to set aside an alleged fraudulent ante-nuptial agreement and in which the widow was successful.

On the hearing on the objections to the accounts the court found that the executor was not chargeable with any fraud; that he had erroneously given credit for $134.-39 more than he had received: that he had made an error of $23 against the estate and that he had not wrongfully or otherwise failed to charge himself with various sums as contended for by the heirs amounting to over $44,000. This estate has been very fruitful in litigation, this being its tenth appearance in either the Supreme Court or this court. The only question at issue in this appeal is the right of the attorneys, who defended against the objections made to the several reports to be paid by the executor out of the estate.

If it be conceded that the executor is not entitled to employ attorneys and pay them out of the estate for contesting matters, which were erroneously charged or in which there was a failure to give credit that should have been given, still the executor was entitled to have the attorneys paid by the estate wherein the objections were overruled.

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The heirs succeeded in their objections to the amount of $18,747.69 composed of the commissions reduced $15,-573.47, where they insisted that no part of the $58,814.15 claimed should be allowed and the $5,175.22 expenses and costs in the anti-nuptial case, which it was held should not be taxed against the estate. They failed in their objections to $156,964.76 composed of the items amounting to over $44,000, with which they contended the executor should surcharge himself and other items of over $67,-000, which they contended he had improperly credited himself and the item of $45,240.65 commissions allowed over their objection.

The executor was acting for the estate and not in his own behalf except so far as obtaining his commissions. The rights and liabilities of an executor are analagous to those of a trustee. Where an executor has need of an attorney, he should be allowed necessary legal aid and legal expenses incurred in discharging his duties in addition to his commission. (Pingreen vs. Jones, 89 Ill. 177; Burnett vs. Burnett, 38 Ill. App. 186; Colton vs. Coffee, Adm. 187 Ill. App. 558.)

Evidence was introduced which shows that nearly three weeks were occupied in the hearing on the objections. Evidence was also introduced which showed the reasonable and usual charges made for such services were from $1500 to $2000 for each of the attorneys. There was no conflict in the evidence. It is also the rule that the Judge before

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whom the cause was heard should exercise his own judgment and is not governed entirely by the opinions of attorneys. He has superior advantages over an Appellate Court because of his opportunities for observing the details of the matter which cannot be shown by the evidence. (Griswold vs. Smith, 214 Ill. 323.) An Appellate Court should not interfer with the findings of the trial court on facts unless there is a manifest error in judgment. One of the findings of the trial court on the objections was that the executor had not been guilty of any fraud or misconduct. He did not attempt to fix the compensation himself, as is usually done, but presented his petition to the court that had heard the objections and was fully advised of the merits of the controversy. The circuit court approved of the judgment of the county court by rendering the same judgment. We do not see any reason for interfering with the order made and it will be affirmed.

Order Affirmed.

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Gen. No. 6829. October Term 1917. Ag. No. 81.

JOHN McLAUGHLIN, Appellee,

212 I.A. 335

vs.

CHICAGO-SPRINGFIELD COAL CO.,
Appellant,

Appeal from Sangamon.

OPINION BY THOMPSON, J.

This is an appeal by the Chicago-Springfield Coal Co. from a judgment for $1200 in favor of John McLaughlin for damages for personal injuries sustained by plaintiff. The declaration alleges that defendant in February 1916, was operating a coal mine, wherein were tracks in various passage ways, wherein coal was removed to a shaft in which were cages for raising coal to the surface of the ground, and that plaintiff was employed as assistant cage man, whose duty was to assist in seeing that cars loaded with coal were properly placed upon cages to be raised to the surface of the ground; that a certain trip of cars came through one of said passage ways so rapidly that instead of stopping at a distance from where said cages were when lowered, it ran into the shaft when the cage was not there; that said car loaded with coal after running into the shaft was held by other cars, in the trip of which it was a part, suspended in the shaft; that the bottom of the shaft was filled with water so that it was impossible to tell whether said car was resting upon the bottom thereof or was held suspended by the other cars in the trip of which it was a part; that plaintiff was ordered by John Helmick, the boss cager, his superior and

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the agent of defendant, to enter the shaft and upon said car for the purpose of uncoupling it that it might be removed from the shaft; that pursuant to said direction he entered upon said car and removed the coupler, which held said car, and when he so removed it said car turned over upon him greatly injuring him, etc. The declaration was amended by adding an averment that the defendant had prior thereto rejected the Illinois Workmen's Compensation Act, and by leave of court after verdict was further amended by adding an averment, that it was the duty of the defendant to use reasonable care to furnish plaintiff a reasonably safe place in which to work, and to make an inspection of the sump and see that it

was safe to go upon said car before ordering him to go thereon but that defendant failed to make any inspection or examination.

It is contended by appellant that the court erred in refusing to give a peremptory instruction to the jury to find for it, and in denying the motion for a new trial because the verdict is against the preponderance of the evidence. The evidence shows that the bottom of the shaft extended about twelve feet below the level of the entry. There was a floor in the shaft about six feet below the floor of the entry. The shaft filled with water up to the level of the entry and the water had to be pumped out daily. Coal and other material was spilled into the shaft which had to be cleaned out daily. On the day the appellee was

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injured water and material filled the shaft to within about three and one half feet of the floor of the entry. A trip of cars loaded with coal came through an entry which sloped rapidly towards the shaft, and instead of being stopped before entering the shaft until the cage descended to receive the cars, ran so far that one of the cars of the trip skidded into the shaft and stopped therein with its top about level or a little above the floor of the entry and leaning against the side of the shaft and another ran on top of the first car. The water and material in the shaft below the floor of the entry had not been cleaned out that morning and it could not be told by inspection whether the car was resting on material on the floor of the shaft or not. The appellee entered the shaft to uncouple the cars, so that they could be taken out of the shaft and while standing with one foot on the first car and the other foot on the ground at the side of the shaft was injured, when he uncoupled the cars by one of the cars turning over and pinning him between it and the side of the shaft, thus breaking his leg.

The appellee and another cager testified that John Helmick was the boss cager, and that he directed appellee to uncouple the cars. Appellant contends that Helmick did not tell appellee "to do anything in particular" and that appellee asked Helmick if it was "all right to cut the cars" and Hemick replied that it was. The declaration alleges it was the duty of appellant to furnish the appellee a reasonably safe

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place to work and avers facts which show that it failed in that duty, and that appellee was injured because of such failure of duty. The appellant had rejected the workmen's compensation act, hence neither contributory negligence nor negligence of a fellow servant is any defence to the plaintiff's cause of action. The verdict and judgment are sustained by the evidence and this court cannot say they are against the manifest weight of the evidence. It is also contended that the peremptory instruction should have been given because there is a variance between the averments of the declaration and the proof, in that the averments are that Helmick ordered appellee to enter the shaft and upon the cage for the purpose of uncoupling the cars; that the appellee removed the coupler and that the car was suspended in the cage, while the proof is that appellee was only partly in the shaft and stood with one foot on the car in the cage and one foot resting on the ground at the edge of the cage; that one Ellison pulled the pin when appellee hit it with a sledge and that the car was only partly suspended and held by the other car so that it turned over when the coupling was broken. The rule is where a tort is averred and the substance of the allegation is proved a slight variance is not material if the opposite party has not been misled. The proof tended to sustain and corresponds with each of the averments, (22 Encyc. of Pl. & Pr. 566,) and no objection was made to the proof when it was offered and no claim was made at that time that there was a variance.

It may also be noted that there is nothing in the record showing that any question of variance was raised in the trial court. The objection of variance, to be preserved as a question of law for review on appeal, must be raised in the trial court and the variance distinctly pointed out to enable the trial court to pass upon it so that the variance may be avoided by amendment if necessary. Libby McNeill & Libby, 146 Ill. 540; People vs. Melnick, 274 Ill. 616; Carney vs. Marquette Coal Co., 260 Ill. 220.

The appellant requested an instruction that if the jury believed from the evidence that the injury sustained by plaintiff was purely accidental it should find the defendant not guilty. The court modified it by inserting after accidental, "without negligence of defendant as alleged in the declaration." Appellant states that the mo-

dification is mileading and unintelligible. The court should have refused the instruction as asked, (Cornwell vs. Bloomington B. M. Assn., 161 Ill. App. 461,) for the reason that if the injury was accidentally received, yet, the appellee was entitled to recover if the evidence showed that the negligence of appellant as alleged was the cause of the accident. The instruction however as modified changed the burden of proof as to negligence in requiring the proof to show that the appellant was not guilty of the negligence alleged before it was entitled to a verdict of not guilty. The law requires appellee to prove the negligence alleged which entitled him to a verdict. If the evidence on

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that question was equally balanced appellant was entitled to a verdict. The instruction should have been modified by inserting "unless you believe from the evidence that the accident resulted from the negligence of appellant as alleged."

The first instruction (No. 5), given for appellee is:—"The court instructs the jury that if you believe from the preponderance of the evidence that the plaintiff was injured as charged in his declaration, and that the defendant was guilty of negligence as charged therein, then in such case you should find the defendant guilty and assess plaintiff's damages at such sum as from the evidence regarding damages you believe will compensate him for such injuries, if any."

There was no question but that appellee was injured as charged. The appellant may have been guilty of the negligence alleged and yet that negligence may not have been the negligence that caused the injury. The instruction does not connect the injury received by appellee with the negligence alleged. Appellant also insists that this instruction was erroneous in not informing the jury that appellant had rejected the Workmen's Compensation Act. There was no error in the instruction in that regard.

The third instruction (No. 7) given for appellee is:—"The court instructs the jury that there was no obligation resting upon plaintiff to make an inspection for any hidden dangers. And you are further in

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structed that if you believe from the greater weight of the evidence that John Helmick ordered plaintiff to attempt to re-

move the coupling between the cars in the sump, and the one immediately above it, then in such event, the plaintiff had a right to rely on the assurance that it was reasonably safe for him to do so."

This instruction assumes that there were hidden dangers, and that part of the instruction is also purely abstract. The instruction was misleading. If there were hidden dangers the jury must find such to be the fact from the evidence and the instruction was erroneous in such assumption.

For the errors in the instructions given and in the modification of appellant's instruction the judgment is reversed and the cause remanded.

Reversed and Remanded.

Re Hearing denied and opinion modified and re-filed July 2nd 1918 Geo. E. Tyler

Gen. No. 6833. October Term 1917. Ag. No. 60.

212 I.A. 635

DAVID SHUTE, Appellant,

vs.

THOMAS GILLOGLY, CHAS. E. MILLER AND G. E. A. SALMANS, Appellees.

Appeal from Douglas.

STATEMENT

This is an action on the case brought in the circuit court of Douglas county by David Shute against Thomas Gillogly, Charles E. Miller and G. E. A. Salmans. Gillogly resides and was served with summons in Douglas county. Neither Miller nor Salmans reside or were served with process in Douglas county; both were served in Vermilion county. The declaration consists of three counts and charges the defendants with fraudulently and deceitfully inducing the plaintiff to exchange real estate owned by him in Indiana of the value of $30,000.00 subject to a mortgage for $12,000 for real estate in Missouri represented to be worth $16,000 with a good title in Salmans but which land was worthless and to which Salmans had neither title nor possession. Each of the defendants was represented by different attorneys; seperate pleas of the general issue were filled by each defendant. At the March Term, 1916, the case was tried before a jury and a verdict returned finding Gillogly not guilty, and the defendants Salmans and Miller guilty and assessing plaintiff's damages at $17,000. The plaintiff entered a motion for a new trial against Gillogly, and the defendants Miller and

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Salmans each entered a motion that the court set aside the verdict as to them and grant a new trial. The court granted the motions of each of the parties and awarded a new trial against all the defendants.

At the October Term 1916, the attorneys for defendant Miller withdrew their appearance for him and at a second trial at the March Term, 1917, no counsel appeared for either Miller or Salmans. The second trial resulted in a verdict finding Gillogly not guilty and Miller and Salmans guilty and assessing plaintiff's damages at $20,221. The plaintiff entered a motion for a new trial

against Gillogly, and the same attorneys, who had represented Miller at the first trial, reappeared and entered a motion on his behalf "for leave to withdraw the plea of general issue heretofore filed by him herein, and for leave to file a plea in abatement to the jurisdiction of the court, and for a new trial" and tendered a verified plea to the jurisdiction averring that he and Salmans were non residents of Douglas county; that neither of them were served with process of summons in Douglas county; that the action is not a local action; that a verdict was not found against Gillogly; that Miller did not appear and defend; that no judgment has been rendered against Gillogly; that none of the defendants, other than Gillogly, reside or were served with process in Douglas county and this he is ready to verify, etc. The defendant Miller filed an affidavit in support of his plea to the jurisdiction, which also contains many of the reasons ordinarily urged for a new trial.

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The court thereupon entered judgment overruling the motion of the plaintiff for a new trial and rendered judgment on the verdict for the defendant Gillogly and as a part of the same judgment, entered an order giving leave to Miller to withdraw his plea of the general issue and to file his plea to the jurisdiction, and at the same time without giving appellant an opportunity to reply to or take any action in reference to the plea to the jurisdiction, entered judgment as follows:-"and said defendant Chas. E. Miller withdraws his said plea of general issue and files his plea to the jurisdiction of the court herein, and on consideration of said defendant Charles E. Miller's said plea to the jurisdiction of the court, doth hereby sustain the same and set aside the verdict of the jury against the defendant Charles E. Miller and the court enters judgment in favor of the defendant Charles E. Miller and against the plaintiff, David Shute, in bar of the action in this court, but the same is not to be a bar to any other action hereafter commenced." The court at the same time rendered judgment in favor of plaintiff against defendant Salmans on the verdict.

The plaintiff appeals from the judgments rendered in favor of defendants Gillogly and Miller.

OPINION BY THOMPSON, J.

Appellant is a farm hand who resides in Douglas

county, Illinois. Appellee, Gillogly, is a real estate agent who resides at Newman, in

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Douglas county. Appellee Miller is a real estate agent and trader who resides at Danville, Vermilion county. Salmans is a real estate trader, whose residence is unknown, but who had an office with Miller in Danville. Appellant, in a trade with appellee, Miller, had acquired title to a tract of 240 acres of land in Indiana for a consideration of $28,800, subject to a mortgage of $12,000. In 1910, Salmans had procured a deed to himself purporting to be made by one Helen Russel for a consideration of one dollar for four sections of land in the Ozarks, in Missouri. Salmans had neither title nor possession of the Missouri land, but had a forged abstract of title signed by the "Missouri & Kansas Abstract Company by Joseph P. Thomas, Secretary," with purported opinions thereon of Daniel Webster and Rufus Choate. If he had had title to the land it was comparatively worthless, its value not being to exceed $3 to $5 per acre. Appellant had placed his Indiana land with Gillogly for sale. In November 1911, appellant was working on a farm 20 miles from Newman, when Gillogly called him over the telephone and told him he had some parties who would trade some land in Missouri for his Indiana land, and made an arrangement with him to go to Tuscola to make a trade. He went there the following day and met Miller and Gillogly. Appellant testified that Gillogly told him that his brother, Ki Shute, had said it was a "rattling good trade and for him to close the deal," "that the Missouri land was worth $100 an acre;" that he

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wished to submit the abstract to an attorney at Chadwick but was advised by Gillogly to go elsewhere and that Gillogly said that a certain attorney they went to see said it was "a straight up to date abstract." There is some evidence corroborating appellant. The evidence of appellant was contradicted by appellee Gillogly. The result, however, was that a deed was obtained from appellant for his Indiana land and a deed was delivered to him from Salmans and wife conveying to him 160 acres of the Missouri land. That he wes defrauded is undoubted and the only controverted question is as to what part appellee Gillogly had in the

transaction.

Appellant contends that the court erred in giving four instructions requested on behalf of appellee Gillogly. The complaint made is that the instructions are argumentative and that some of them called attention to particular parts of defendant's evidence and instructed a verdict and that one of them gave an improper measure of damages if the jury should find against Gillogly.

The instruction concerning damages to be assessed against Gillogly need not be considered for the reason the jury did not find it necessary to consider it. Some of the instructions are somewhat argumentative but the argument in appellant's ten instructions, none of which are printed, in the abstract, is much greater than that in appellee's fewer instructions. It is also argued that the last instruction given for appellee told the jury that a verdict could not be rendered against

Gillogly unless the preponderance of the evidence showed that Gillogly either assisted Miller or Salmans or one of them in perpetrating a fraud upon plaintiff. That is the theory of each count of the declaration and upon which the case was tried for appellant and the co-defendants were found guilty. While the instructions for Gillogly are subject to some criticism, when they are considered with the numerous argumentative instructions given at the request of appellant, we do not see how the jury could be misled by them.

It is also argued that the verdict in favor of Gillogly is against the preponderance of the evidence. There have been two trials before juries that have found the same way. The evidence is very conflicting with no such manifest preponderance either way, such as would justify an appellate court in interfering with the finding of a jury approved by the judgment of the trial court. The judgment will be affirmed as to appellee Gillogly.

Appellant contends that the court erred in granting leave to appellee Miller to withdraw the general issue and file a plea to the jurisdiction of the court and in rendering the judgment that was entered on that plea. The argument of appellant is that Miller having appeared by counsel, filed the general issue, testified in his own behalf and taken an active part in the first trial, and appellant having in good faith presented evidence on which, considered alone under the pleadings,

he would be entitled to a judgment against the resident defendant, that the only thing that would justify the order and judgment of the court would be a dismissal of the suit against the resident defendant. It is contended on behalf of appellee Miller, that he had the right to appear and file the general issue and if a judgment should not be rendered against Gillogly, the resident defendant, then he has the right to withdraw his plea of the general issue and file a plea to the jurisdiction of the court.

Under Section 6, of the Practice Act, "It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except in every species of personal action in law, where there is more than one defendant, the plaintiff commencing his action where either of them resides may have his writ or writs issued directed to any county or counties where the other defendant or either of them may be found: Provided that if a verdict shall not be found or judgment rendered against the defendant or defendants, resident in the county, where the action is commenced, judgment shall not be rendered against those defendants who do not reside in the county, unless they appear and defend the action, nor then if the action is dismissed as to the defendant or defendants resident in the county."

Appellee, Miller, appeared and filed the general issue. He participated in the first trial in which a verdict was rendered against

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him. The jury on both trials rendered a verdict against the appellant and in favor of appellee Gillogly, who is a resident of and served with process in Douglas county and against the appellee Miller. If the evidence of appellant was the only evidence concerning the facts he is entitled to a verdict and judgment against Gillogly and also against the other appellees.

The statute is very clear that judgment shall not be rendered against non resident defendants not served with process in the county, unless a verdict shall not be found or judgment rendered against defendants resident in the county where the action is commenced, unless the defendant who does not reside in the county shall appear and defend, nor then if the action is dismissed as to the defendant or defendants resident in the county.

There can be no doubt but that appellant is prose-

cuting the case against the appellee Gillogly and the other appellees in good faith in the belief that he had a good cause of action against the resident defendant and that he was not made a party defendant for the purpose only of having a resident defendant. The appellee Miller did appear and defend, and when it was demonstrated that he was guilty and had no defence, his counsel withdrew their appearance for him. Having appeared and defended, he thereby gave the court jurisdiction over his person and under the statute the court having obtained jurisdiction by service of

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process with an appearance and defence presented, the only way the court could lose jurisdiction so obtained was by a dismissal of the case as to the resident defendant. Statute, Practice Act, Sec. 6; Lehigh Valley Trans. Co. vs. Sugar Co., 228 Ill. 121; Williams vs. Morris, 237 Ill. 254.

The court erred in granting leave to Miller to withdraw the general issue and to file a plea to the jurisdiction. The appellee Miller has not assigned any cross errors. This is an action in tort. "The right of a plaintiff in an action of tort to sue as many defendants as he chooses and to have judgment against those only who are proved guilty is well established. So is his right to take judgment against a part only of those against whom a verdict is rendered," or a judgment may be entered on a verdict against part of the defendants and a new trial may be granted as to others. Pecararo vs. Halberg, 246 Ill. 95; Hermason vs. Michigan Cent. R. R. 259 Ill. 470; I. C. R. R. vs. Foulks, 191 Ill. 57. That part of the order granting leave to appellee Miller to withdraw his plea of the general issue and to file a plea to the jurisdiction and the judgment entered in his favor are reversed, and the cause is remanded with instructions to over rule the motions entered by Miller for leave to withdraw the general issue and to file a plea to the jurisdiction and with directions to take such further proceedings on the verdict against Miller as are required by law.

Affirmed in part, reversed in part and remanded for further proceeding in conformity with law.

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Gen. No. 6837. **October Term 1917.** **Ag. No. 63.**

JOHN HISSONG, Appellant,

vs.

ARTHUR WILLARD, Appellant.

212 I.A. 635

Appeal from Champaign.

OPINION BY THOMPSON, J.

John Hissong began this suit, in the circuit court of Champaign county against, Arthur Willard to recover damages alleged to have been sustained as the result of defendant with an automobile overtaking and colliding with a carriage in which plaintiff and his wife were riding. The damages claimed were damages to the buggy and harness; expenses for medicines and physician's care in the treatment of his wife for injuries averred to have been caused by the collision and damages for loss of services of his wife.

The original declaration as amended contains three counts; seven additional counts were also filed. Some of the counts are in trespass and others in case. The court sustained a special demurrer to the first and third additional counts.

The first additional count avers that Kate Hissong was the wife of plaintiff, who was the head of a family and entitled to the services of his wife, which were of great value; that plaintiff and his wife were driving in a carriage drawn by a horse along a public highway in the city of Champaign with all due care and caution upon the right side of the center of the beaten track of said highway in an easterly direc-

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tion; that defendant was driving an automobile along said highway from behind and in the same direction that plaintiff and his wife were going; that defendant was rapidly approaching plaintiff and wife in said carriage and overtook said carriage; (1) that defendant was intoxicated and was driving said automobile at a greater rate of speed than was reasonable and proper having regard to the traffic and use of said highway and so as to endanger the life and limb of the wife of plaintiff and others lawfully on the highway; (2) was driving upon said highway, where it passes through a residence portion of the city of Champaign, an incorporated city, at a rate of speed greatly

in excess of 15 miles an hour; (3) was driving, long after sunset and prior to one hour before sunrise on the day following, without carrying on said automobile two lighted lamps showing white lights visible 200 feet in the direction toward which said automobile was going; and (4) was driving said automobile with a wanton, reckless and total disregard for the life of others upon said highway, whereupon it became his duty to pass on the left side of the carriage of plaintiff without interference and to use all reasonable care to avoid colliding with the carriage of plaintiff and with the plaintiff or his wife, but said defendant failed and neglected to pass on the left so as to pass without interference, and failed to use reasonable care in driving his automobile, but continued on the right side of the center of the beaten track, by means whereof defendant negligently and with a wanton and

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reckless disregard for the rights of plaintiff and his wife drove his automobile against the carriage of plaintiff and broke and damaged it, and with great violence threw the wife of plaintiff from her seat in the carriage on the floor thereof, greatly bruising and injuring her so that she became sick, disordered and permanently injured and so remained from thence hitherto, during all which time plaintiff suffered the loss of the services of his wife which had been of great value prior to the time of her injury, and was caused to expend large sums of money in having such services performed and in caring for her, etc. The third additional count is in trespass and alleges that defendant, with great force and violence, drove his automobile against the carriage of plaintiff and violently knocked plaintiff and his wife from their seat in the carriage, thereby causing permanent injury to the wife of plaintiff, whereby plaintiff has been deprived of her services and expended money to provide medicines and care, etc.

One of the special grounds of demurrer to the first additional count is that it is bad for duplicity, particularly setting out the independent charges of negligence averred, and to the third additional count that it does not aver that the wife of plaintiff at the time of her injury was in the exercise of due care.

The first additional count states several specific acts of negligence. Three of these are infractions of different sections of

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the Motor Vehicle Act of 1911. A fourth alleges a willful and reckless disregard for the lives of other travelers. Section 4 of the Motor Vehicle Act requires a person running an automobile between sunset and one hour before sunrise to have two lighted lamps showing a white light at least 200 feet in the direction toward which the vehicle is going. Section 10 provides that no person shall drive a motor vehicle upon any public highway at a speed greater than is reasonable and proper having regard to the trafic and use of the way or so as to endanger the life or limb of any person and if the rate of speed of any motor vehicle on any public highway, where the same passes through the residence portion of any incorporated city, exceeds 15 miles an hour such speed shall be prima facie evidence that it is being run at a greater speed than is reasonable. Section 16 of that act provides that any person operating a motor vehicle overtaking any vehicle, in passing it, shall pass to the left thereof.

This count avers a negligent infraction of three different sections of the act, any one of which furnishes a basis for a cause of action for damages.

"A declaration is duplicitous when it contains in the same count more than one fact for the recovery of a single demand, any one of which would justify a recovery." 7 Encyc. PL. & Pr. 237; Shipman on C. L. pleading 349; 31 Cyc. 119; Gould on Pleading Sec. 79; C. B. & Q. R. R. vs. Mager, 60 Ill. 529; Sleeper vs. Banquet Hall Co., 166 Ill. 57;

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Chicago City Ry. Co. vs. O'Donnell 207 Ill. 478; Chicago West Division Ry. Co. vs. Ingrahm 131 Ill. 659; Laporte vs. Cook, 20 R. I. 261; Matz vs. Chicago & Alton R. R., 88 Fed. 770; Haberlau vs. L. S. & M. S. R. R., 73 Ill. App. 261. The first count is bad for duplicity.

The third additional count is a count in trespass for damages for the loss of services of the wife. Section 36 of the Practice Act provides that, "The distinction between the actions of trespass and trespass on the case are hereby abolished; and in all cases where trespass or trespass on the case has been heretofore the appropriate form of action either of said forms may be used as the party bringing the action may elect.,, This statute does not affect rights of parties or give any other remedy for acts done than before existed. It does away with the technical distinction only. Blalock vs. Randall, 76 Ill. 224. The

only effect of the statute is to permit counts under either form to be joined, where before only one could be used when either was proper. The damages declared for were not direct but indirect and consequential and trespass does not lie for damages to the husband for loss of services of the wife because of her injury. 6 Cyc. 693. There was no error in the rulings on the demurrer.

The case went to the jury on the amended first, second, third and the fifth additional counts. The first amended and fifth additional counts are in case and seek to recover damages for injury to the person of appellant. No proof was offered of any damages under these counts. The second and third amended counts are also in case and aver negligence of appellee and resultant damages to appellant through loss

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of services of the wife, medical attention furnished her and damages to the buggy. The other counts were withdrawn by appellant.

The evidence shows that in the latter part of August 1915, about eight o'clock in the evening, appellant and his wife were driving east, on a paved residence street in the city of Champaign, in a pheaton drawn by one horse close to the curb on the south side of the street. The appellee, in an automobile, drove along this street going in the same direction behind appellant and ran into his phaeton, breaking the reach and pushing the rear wheels of the carriage forward so that its body dropped down on the axle. There is no dispute over the fact that the appellee in endeavoring to avoid a collision, drove his automobile toward the right-hand side, so that it was partly upon the curb but the automobile struck the carriage and damaged it. The controverted question is whether appellee was guilty of negligence in running into appellant's vehicle, and whether appellant was deprived of the services of his wife by reason of injuries claimed to have been sustained by her through the collision. The automobile stopped against the phaeton and partially upon the curb on the south side of the street.

The evidence on behalf of the appellee tends to show that he was running his automobile at the rate of eight to ten miles an hour, and that an automobile coming from the east on the north side or center of the street with strong head lights, for the distance of two blocks so blinded and dazzled his eye sight that he could not and did not see the

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conveyance of appellant until the bright lights passed him, when he was about six feet from the carriage, and that he had slowed down to six miles an hour when the dazzling lights passed. The appellant was driving on the proper side of the street. If appellee could not see where he was running his automobile, we are of the opinion he should have stopped until he could, and that it was negligence to run down appellant, who from the evidence appears to have been in the exercise of ordinary care.

The evidence concerning the loss to appellant of the services of his wife, if any, and the cause thereof, is very conflicting and we express no opinion on that question, but there is no conflict concerning the damages to the vehicle of appellant and that they were caused by appellee's automobile. The proof tending to show negligence on the part of appellee preponderates to such an extent in favor of appellant that a new trial should have been granted.

It is also urged that the court erred in giving and refusing instructions. No instruction requested by appellant were refused, the substance of which was not given in other instructions.

The third and last instructions given for the appellee are technically erroneous in limiting the ordinary care of appellee in running his automobile to the time of the accident " and immediately prior to the collision." The evidence of appellee is that he ran his auto-

mobile a considerable distance when he "could not see a thing" because of the extremely bright lights coming toward him and it was not until the lights passed him when he was six feet behind appellant's carriage that he could see in front of his machine. These instructions are misleading as they might be understood as only requiring ordinary care after he passed the dazzling lights. While complaint is made of other instructions, there is no error is the matters argued. Two instructions were given telling the jury that if the injury to plaintiff was the result of an accident the verdict should be for the appellee. If the collision was the result of an accident the appellee might still be liable, if the accident was caused by his negligence, hence the instructions should have been modified by adding the phrase, unless the jury from the evidence believe the accident was caused by the negligence of defendant.

The judgment is reversed and the cause remanded.

Reversed and Remanded.

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212 I.A. 635

Gen. No. 6841. October Term 1917. Ag. 66.

KATE HISSONG, Appellee,

vs.

ARTHUR WILLARD, Appellant.

Appeal from Champaign.

OPINION BY THOMPSON, J.

This is an appeal from a judgment for $1500 rendered in favor of Kate Hissong against Arthur Willard for damages for personal injuries, alleged to have been sustained by her from a collision in which an automobile, driven by the defendant, overtook and collided with a phaeton in which she was riding. The case was submitted to the jury on nine counts of the declaration, each of which avers a specific act of negligence. The damages sued for are for permanent injury, physical pain, mental suffering, inability to attend to her business affairs and loss of social intercourse with her friends.

On the last Sunday in August, 1915, about eight o'clock in the evening, appellee was riding east in a single seated phaeton drawn by one horse, driven by her husband, close to the south curb of Green street, a paved east and west street, in the city of Champaign. The appellant drove along this street in an automobile behind the carriage appellee was riding in and in the same direction, and ran into the rear of the carriage, breaking the reach and pushing its rear wheels forward so that its body dropped down on the axel.

The automobile had been going at a speed of from eight to ten miles

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an hour. Appellant testified that a high powered automobile with exceedingly bright lights, coming west, had so dazzled his eyes for about two blocks as it approached him, that he could not see anything until it passed him about six or eight feet west of the phaeton, and that he had slowed down to six miles an hour, and then, after the bright lights had passed, he saw the carriage and tried to avoid it by putting on the brakes and running over the south curb upon the parkway between the pavement and the sidewalk.

It is contended that the court erred in sustaining an objection to the admission of an affidavit as to what A. Craig, an absent witness, would testify to. The affidavit was filed in support of a motion for a continuance because

of the absence of two witnesses, Craig and Wm. Buchanan, who it was stated in the affidavit would testify to certain facts. The appellee conceded that the witnesses, if present, would testify as stated in the affidavit, and that the affidavit would be admitted. The court thereupon overruled the motion. The record shows that on the trial, "Defendant also offered in evidence in this affidavit for a continuance, the affidavit as to William E. Buchanan." The appellee objected to a certain part of the affidavit that stated what Buchanan would testify to on the ground it was conclusion only, and the court sustained the objection to that part of it. Appellant insists that the court erred in sustaining an objection to the part of the affidavit that stated what Craig would swear to. The record does not

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show that appellant offered that part of the affidavit or that appellee objected to it, hence there is no error in that contention of appellant.

It is also contended on behalf of appellant that the evidence does not show that he was guilty of any negligence. The jury found that appellant was guilty of negligence in running his automobile on the street without having it under control so as to avoid running down travellers in the exercise of ordinary care, when he could not see where he was going. The evidence amply sustains that finding.

Appellee did not testify in the case. The evidence on behalf of appellee, as to what occurred at the time of the collision, was that of her husband. He testified that Willard was under the influence of lipuor and that the shock of the collision threw his wife so that "her head was down in the left hand corner, the angle of the seat and back, with her knees up and her feet hanging down." A physician was called that evening, who found her in a very nervous condition with a bruise on her head above and behind her right ear. He also visited her the next day. She does not appear to have seen or had need of a physician again until in February, 1916, when the same physician was called and gave her treatment until March 11th, when her mental condition growing worse and he, fearing it would become permanent, advised that she be sent to a sanitarium, at Indianapolis, where she was taken and treated by a physician for three weeks. This physician testified on behalf of

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appellee that she was of a neurasthenic type, that her mother had died from pernicious anemia; that he learned these things from appellee when he axamied her for treatment; that a neurasthentic never recovers and probably gets worse as they get older and that his experience was that a patient might show great symptoms of neurasthenia until after the interest or excitement of a law suit was over, when the patient would entirely recover. He also testified that he did not see appellee, from the time she left the sanitarum, until a week before the trail in July 1917, when he examied her and found her physical condition better but her mental condition worse. We do not find any evidence in the record showing that the neurasthenic condition of appellee resulted from or was caused or aggravated by the collision and she is not entitled to recover for such condition without some proof tending to connect such condition with the alleged injury. Appellee concedes that no evidence was offered of expert witnesses to show that a condition, similar to that of appellee nearly two years after the collision, would result from such an accident or such an injury as was received by appellee.

The declaration does not contain any count alleging general negligence. The second instruction informs the jury that if they find the appellant was operating his automobile in a careless or negligent manner and by reason thereof the collision occurred and appellee was injured, they should find for appellee. The instruction is tecnically erroneous

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in authorizing a recovery for negligence which may not be averred in the declaration. The seventh is subject to the same criticism.

It is also argued that the court erred in permitting witnesses, Hubbard, Hardesty, Seth and Scoggin, to give testimony concerning subjective symptoms of the injuries and condition of appellee. The fact that the witnesses were not experts is not an objection to their giving testimony concerning "whether persons are in good health, have ability to perform work, whether they are suffering pain, are conscious or unconscious, in possession of their mental faculties," etc. (Lauth vs. Chicago Union Traction Co., 244 Ill. 249.) Statements by lay witnesses, that a party was "suffering," was "nervous," was "in misery," "in distress," "sore" or "in pain" are competent.

(C. & E. I. R. R. vs. Randolph, 199 Ill. 126; West Chicago Street Ry. Co. vs. Fishman, 169 Ill. 196.) "Declarations as to the pain and suffering of the injured party, when made by such party are only competent, if made at the time of the injury so as to constitute a part of the res gestae or when made to a physician during treatment" and are not competent evidence when made to a physician upon an examination for the purpose of testifying. (East Lake St. El. R. R. Co. vs. Shaw, 203 Ill. 39.) Sarah Hardesty testified that appellee complained of her head and back after she returned from the sanitarium, but no objection to the question or motion to strike the answer was made. The other witnesses only testified to the actions and appearance of appel-

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lee, except on their cross examination, when they told of statements made by her. Some of the witnesses also compared her condition with what it was at other times. They should simply have described her condition and left the conclusions to be drawn therefrom by the jury.

The appellee is the wife of John Hissong and before the collision devoted her time to housekeeping for him and he, if any one, is entitled to recover for the loss of such services. The jury were instructed that if they found for the plaintiff they should fix the damages at such amount as from the evidence you may find she has sustained, not exceeding the amount claimed in the declaration. This instruction in connection with an instruction, not limited to any kind of damages, which told the jury that to estimate the damages it was not necessary that any witness should have expressed an opinion as to the amount, but the jury might make such estimate from the facts appearing in evidence, was misleading and prejudicial as it would naturally be construed as covering the value of her domestic services and medical expenses paid by her husband. The husband being entitled to recover for the loss of services, if any, the instructions should have been limited to the damages she was entitled to recover for, if any, and if she paid out money or incurred liability for necessary medical and hospital expenses because of her injury the

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amounts must be shown by the evidence. Several of appellee's instructions are subject to this criticism.

An instruction was also given at the request of appellee, that if they found from the evidence that appellant was running his automobile on the highway without two lighted lamps showing a white light visible at least 200 feet in the direction he was going and it was after sunset, etc. and by reason of his failure to have his automobile so equipped the collision occurred, then they should find for appellee. There was no evidence whatever on which to base this instruction.

For the errors pointed out the judgment is reversed and the cause remanded.

Reversed and Remanded.

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Gen. No. 6846. October Term 1917. Ag. No. 69.

M. J. BARTEL, Appellee,

vs.

MARY R. ZIMMERMAN, ET AL., Appellants.

212 I.A. 635

Appeal from Sangamon.

OPINION BY THOMPSON, J.

This is a bill in equity filed by M. J. Bartel in October 1914, against Mary R. Zimmerman, Joseph Zimmerman and Annie Reich, praying that certain described real estate , once owned by Mary R. Zimmerman and conveyed to Anna Reisch, may be held to be subject to the payment of the balance of a judgment for $3180, recovered July 22, 1913, in favor of complainant against Mary R. Zimmerman and Joseph Zimmerman and the further sum of $4199.20 with interest at 5% from June 18, 1914 being one half of a judgment for $8398.43 and costs rendered in favor of the the First National Bank of Springfield against complainant, Mary R. Zimmerman and Joseph Zimmerman which had been paid by complainant and the judgment assigned to him, and that a decree be entered setting aside the conveyance of said real estate and subjecting the same to the payment of said claims.

The bill alleges that on July 9, 1913, a judgment was recovered by complainant against Mary R. and Joseph Zimmerman for $3180 on which execution had been issued and upon which $704.89 had been collected from Joseph Zimmerman and credited on the judgment and the execution returned unsatisfied as to the remainder; that on September 15, 1913, the First National Bank, of Springfield, recovered a judgment against the Zimmermans and com

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plainant for $8398.43 on which execution had been issued, and the complainant, to prevent the sale of his property, had paid said judgment and taken an assignment thereof to himself and the execution had thereupon, after demand upon the said Zimmermans, been returned "no part satisfied and no property found". The bill further alleges that at the time of bringing said suits, Mary R. Zimmerman was possessed of and owned certain described real estate and still resides thereon; that Annie Reisch now holds title of record to said real estate which was the property of said Mary R. Zimmer-

man and Joseph Zimmerman, and that the same cannot now be levied upon by execution, and the title to said real estate in now held by Annie Reisch for the benefit of the creditors of Zimmermans; that "Annie Reisch is the mother of Mary R. Zimmerman and that said deed of conveyance executed by Mary R. Zimmerman and Joseph Zimmerman, her husband, to the said Annie Resich is a fraud on the rights of complainant and the First National Bank" and made with the intent of hindering, delaying and defeating complainant and said bank or its assignes from recovering upon their judgments; that the amount due complainant was long past due at the time said deed of conveyance was executed and the said Zimmermans and Annie Reisch, the grantee in the deed, had notice of the pendancy of such suits when the deed was made.

The bill further alleges that the judgment in favor of said bank was recovered on a note for $7650, executed by Zimmermans and complainant, on which MaryR. Zimmerman and complainant were sureties for Joseph Zimmerman

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and that complainant, having paid said judgment is entitled to recover half the sum paid by him from his co-surety; and that the Zimmermans have no property from which said judgments can be collected.

The bill does not in terms allege the making of the deed by the Zimmermans to Annie Reisch except by inference from the allegations that Mary R. Zimmerman owned the real estate, when the common law suits were begun, and that Annie Reisch now holds title of record to it.

The answers of the defendants state that Mary Zimmerman owned the described premises until May 16, 1913, when she conveyed them by warranty deed to the defendant Annie Reisch, and that Mary R. Zimmerman still occupies said premises as tenant at will and deny all charges of fraud and assert that the conveyance was made in good faith for a consideration of $9000, which was a full consideration, and that Mary R. Zimmerman at the time of making the conveyance was indebted to Annie Reisch in the sum of $12,000.00

The master reported the evidence, with his conclusions that Mary R. Zimmerman was, at the time of the making of the conveyance, indebted to Annie Reisch for money advanced in an amount far in excess of the value

of the premises which was $9000. The circuit court sustained exceptions to the master's report and found that Annie Reisch had a valid claim against Mary R. Zimmerman to the amount of $4000 only; that Mary R. Zimmerman had an estate of homestead in the said premises to the extent of $1000

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and that said real estate may be levied upon to satisfy the execution in favor of complainant against Mary R. and Joseph Zimmerman and that complainant is entitled to be subrogated to the rights of the First National Bank as co-surety with Mary R. Zimmerman in the sum of $4398.57, one half the sum paid by him on the bank judgment with interest, and adjudged that the deed of May 16, 1913 is void except as to a lien in favor of Annie Reisch for $4000 and the homestead interest of $1000 and that the premises be sold etc. The defendants appeal.

Appellants have not raised any question concerning the failure of the bill to allege how the conveyance was made, the date of it or to allege the facts concerning the deed, which it is sought to have declared void.

It is insisted by appellants that the court had no jurisdiction to grant any relief concerning the judgment for $8398.43 on the note for $7650.00, that was executed by appellee with Mary R. Zimmerman as co-sureties for Joseph Zimmerman and which judgment was paid by appellee and an assigment of it taken to himself. The judgment for $3180.00 in favor of appellee against the Zimmermans and the execution issued thereon with the return nulla bona gave the court jurisdiction to settle the equities between the parties, and having taken jurisdiction to settle the rights of the parties as to that judgment, it will retain jurisdiction to settle all equities between the parties and to avoid a multiplicity of suits. Braithwaite vs. Henneberry, 222 Ill. 50; 12 Encyc. of Pl. &Pr. 162.

The undisputed facts are that appellee held a note for $3000 dated

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July 9, 1912, due in three months after its date executed by Joseph Zimmerman and Mary R. Zimmerman on which judgment was rendered against the makers July 23, 1913, for $3180; that execution was issued on this judgment; that Joseph Zimmerman made a schedule of his property and there was realized on the execution $704.89 which was applied on the judgment and the remainder of the

judgment is due and unpaid and that neither of the Zimmermans have any property beyond their exemptions and that an alias execution was placed in the hands of the sheriff a few days before the filing of the bill herein; that the judgment for $8398.43 was rendered against appellee and the Zimmermans on September 15, 1913, in favor of the First National Bank of Springfield on a note for $7650, dated July 9, 1912, due six months after date on which appellee and Mary R. Zimmerman were co-sureties; that an execution was issued on this judgment and neither of the Zimmermans having any property the appellee paid the judgment to the sheriff and had it assigned to himself by the bank. Appellee and Mrs. Zimmerman being sureties on the note and appellees having been compelled to pay the entire judgment Mrs. Zimmerman equitably should refund to him one half of the amount paid by him.

Mary R. Zimmerman was the owner of the real estate described in the bill and upon which she resided with Joseph Zimmerman, her husband. The complainant does not contend that this real estate was of the value of more than $9500, in May 1913. Prior to May 1913, Joseph Zimmerman was engaged in the piano business and had given notes to various parties that

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were signed by his wife as surety. Zimmerman, from the evidence, appears to have had no financials means.

Annie Reisch is an old lady, whose business was transacted for her by her son. She is the mother of Mrs. Zimmerman and had agreed to pay certain notes that her daughter had signed with Zimmerman, her husband, and had requested her not to sign any more and had asked her daughter to execute a deed to her of the property in which the daughter resided that had been given to her by her mother. After the request to the daughter not to sign any more notes, she with her husband had executed the $3000 note to appellee and the note for $7650 to the First National Bank that was also signed by Bartel. The notes signed by Mrs. Zimmerman as surety for her husband that Mrs. Reisch had agreed to pay for her daughter, prior to May 16, 1913, amount to about $30,000.00 Mrs. Reisch had paid interest on such notes, to the First National Bank on January 2, 1913, $256.86 onMay 8, 1913, $264.00and on January 31, 1913, to George Hofferkamp $610. On May 9, 1913, Mrs. Reisch had given her note for $3000 to the Ridgley National Bank in payment of a

note made by her daughter. Amongst other notes made by Mrs. Zimmerman which Mrs. Reisch had agreed to pay for her daughter was a note of $6000 to George Hofferkamp, one for $3000 to Anna B. Klor, one for $1000 to Lena Klor, to Mary Plattner $1400.00 and a note for $400 to the First National Bank. Prior to May 16, 1913, Mrs. Reisch had asked her daughter, Mrs. Zimmerman, to execute a deed to her of the premises in which her daughter resided.

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On May 16, 1913, Mrs. Zimmerman and her husband executed a deed to her of the premises in which they resided and had a homestead, and on that day Mrs. Reisch paid the $4000 note to the First National Bank and advanced the further sum of $2000 to her daughter and her husband, which was used to pay off a claim against the Zimmerman Piano Company held by an attorney for collection, but on which Mrs. Zimmerman was not liable.

It appears from the evidence of disinterested witnesses that Mrs. Reisch, before the execution of the deed had paid $4130.86 for her daughter. This sum is composed of the interest payments to the First National Bank and to Hoffenkamp and the $3000 note to the Ridgley Bank. On the day the deed was executed she paid the $4000 note to the First National Bank and $2000 to her daughter and son-in-law, $1000 of which she had the right to pay them for their homestead estate, but the other $1000 she had no legal right to pay to them from the proceeds of the premises conveyed,if it had been paid from such proceeds as against the creditors as it was not paid on a debt of her daughter. There is no question but at or before the time the deed was executed she had rightfully paid $8130.86 for her daughter without including her homestead interest, and had before that time also agreed with the holders of certain notes and her daughter to pay for her, the Hofferkamp, Klor and Plattner notes amounting to $11,400.00 with other notes amounting to several thousand dollars.

The trail court in its decree found that after the making of the

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deed that "Annie Reisch afterwards voluntarily assumed and became liable to pay the sums of $3000 to Mrs. Klor; $1000 to Miss Klor; $6000 to George Hoffenkamp; $5000 to Mrs. Hay; $5000 to Mrs. Brown; $3000 to the Ridgley National Bank and $1400 to Mary Plattner; that the def-

endant Annie Reisch simply agreed to pay them afterwards because they were her daughter's debts and because she wanted her daughter's debts paid and that said sums were no part of the consideration for said deed and that the only legitimate consideration for the deed was the $4000 paid to the First National Bank. The proof is that Mrs. Reisch agreed to pay said sums for her daughter before the deed was made.

She paid and assumed for her daughter three times the value of the premises as a consideration for the conveyance and having paid an adequate and full consideration in good faith, there is no rule of equity, which will make her or the property she received liable for debts of her daughter, which she did not assume, because she voluntarily advanced money to her daughter upon which her creditors had no claim.

A debtor has the right to prefer one creditor over others to the exclusion of the others, where the consideration is sufficient to support the transfer when the transfer is made in good faith. A creditor violates no rule of law when he takes payment of his demand although other creditors are thereby deprived of all means of obtaining satisfaction of their claims. The evidence in this case shows that Annie Reisch paid a full and adequate compensation for the property transferred to her, (Hessing vs. McCloskey, 37 Ill. 343; Miller vs. Kirby, 74

Ill. 242; Schroeder vs. Walsh 120 Ill. 403,) and the fact that she was the mother of the grantor did not prevent her from securing repeyment of the money she had advanced or become bound to pay for her daughter. The court erred in granting the relief prayed. The decree will be reversed and the cause remanded with instructions to dismiss the bill for want of equity.

Reversed and Remanded with Directions.

GEN. NO. 6697. OCT. TERM A. D. 1917. AG. NO. 2.

VIRGINIA GISE, Plaintiff in Error.

vs

212 I.A. 636

A. M. HEWITT, ET AL., Defendants in Error

Error to Circuit Court Christian County.

ELDREDGE P. J.

This is an action in assumpsit brought by plaintiff in error, Virginia Gise, to recover on two prommissory notes each for $3,500.00, together with the accrued interest thereon. The declaration contains the common counts and also special counts on the notes. These notes were each signed by eleven persons, nine of whom are made defendants in this suit and are the defendants in error in this court, vis: A. M. Hewitt, Robert D. Taylor, H. A. Payne, R. C. Morris, Sr., R. C. Morris, Jr., J. H. Davis, R. E. Payne, P. H. Ward and Harry Spurling. The defendants filed the plea of the general issue together with a notice of special defenses thereunder. The defenses set out in the notice are substantially as follows: that plaintiff was not the holder of said notes in due course of business for a valuable consideration prior to their maturity; that plaintiff claimed an interest in certain lands in Texas (describing them) and filed her claims since the beginning of

this suit, claiming to own an interest in the lands which were to have been deeded to defendants on account of the delivery of said notes sued upon, together with other notes; that the legal title to the land, at the time these notes were delivered, was in Lloyd P. Gise and the same has been redelivered to him for the benefit of himself and whatever claim the plaintiff may have therein; that said notes were transferred to the plaintiff after maturity and are subject to all the defenses between said Lloyd P. Gise and the defendants, and that the delivery and possession of said notes by the plaintiff herein was fraudulent and wholly without consideration.

At the close of the evidence introduced on behalf of the defendants, plaintiff made a motion to instruct

the jury to find the issues for the plaintiff which was overruled. At the close of all the evidence plaintiff renewed her motion to so instruct the jury and defendants also made a motion to instruct the jury to find the issues for defendants. The court overruled plaintiff's motion, sustained the motion of defendants and instructed the jury to find the issues for defendants. A motion by plaintiff to set aside the verdict and for a new trial was overruled and judgment was entered on the verdict in favor of defendants, to reverse which this writ of error is prosecuted.

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There is substantially no conflict in the evidence on the facts. Prior to February 10, 1913, plaintiff in error Virginia Gise, of Chicago, her mother Millie K. Gise, her brother Edgar Gise and her cousin Ward K. Gise, purchased a large tract of land near the towns of Big Wells and Cotulla, Texas. The title was taken in the name of Lloyd P. Gise who was a cousin of Virginia and a brother of Ward K. Gise. Lloyd P. Gise lived at Big Wells and the title was placed in his name for convenience for the purpose of selling the same. The authority of Lloyd P. Gise in the control and sale of the lands was apparently unrestricted and curtatiled only by the limits and dictations of his own judgment. Virginia Gise testified: "I was looking to L. P. Gise to look after my interest in this matter. I trusted him to take care of my interest. I trusted him and permitted him to sell the land; that was what we put the title in his name for, to expedite sales down there. I never put any definite limitations upon his authority. He was authorized by me to sell the land and collect the money or notes, and give my share of either. I can think of no other authority. I never gave him any direction as to how he was to execute that authority. I left that for his own judgment. Up until this trouble occurred, I never gave him any specific directions as to in what manner or how he should dispose of the land. I left that matter entirely to him. The title was put in

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his name for that purpose." The defendant in error throughout the transaction herein never knew anything of plaintiff in error or that she or any

one else claimed any title or interest in the lands in controversy until plaintiff in error brought this suit to recover upon the notes in question.

On February 10, 1913, articles of agreement were entered into between Lloyd P. Gise as party of the first part and H. C. Payne of Taylorville, Illinois, as party of the second part. This contract was recorded and provides that said Gise has sold the lands in question to said Payne for the sum of $35,000.00 to be paid as thereinafter stated; that in payment for the land Payne togethor with some associates agrees to execute and said Gise agrees to accept personal notes of Payne and his associates payable annually in one, two, three, four, and five years from June 1, 1913, all bearing interest from March 1, 1913, at the rate of six per cent, payable at the Cotulla State Bank, of Cotulla. Texas, said amount being divided in ten notes of $3,500.00 each, two due each year: that Gise reserves the right to investigate the financial standingg of said associates, which, if not found to be satisfactory, he shall at his option cancel the contract and cause the same to be null and void; that upon the execution and delivery of said notes, Gise shall make a

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warranty deed to the lands to whom Payne may direct, conveying and warranting the title thereto and that he will furnish an abstract of title which shall show merchantable title thereto or the contract to become null and void at the option of Payne, which said deed and abstract shall be placed in escrow with the Cotulla State Bank until all of said notes have been paid, at which time said deed and abstract shall be delivered by said Bank to him, his heirs, agents or assignees; that when $10,000.00 has been paid, all of said personal notes then in the possession of said Gise will be returned to the makers thereof and Gies will accept in lieu thereof Texas Standard form vendor's lien notes and make a new deed reserving the vendor's lien therein as security for said vendor's lien notes and deliver said deed and abstract upon completion of the payments: that Payne will start actual substantial improvements by April 1, 1913, and that he and his associates will expend at least $5,000.00

within the course of one year from that date.

The ten notes for $3,500.00 each provided for by the contract were executed by Payne and his ten associates, eight of whom are parties defendant with payne in this suit and defendants in error in this court. Three of these notes were endorsed by Gise and immediately returned to Payne. The actual consideration for the land purchased was $24,500.00 and not $35,000.00 as stated in the contract. It appears that the three

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notes, which were endorsed by Gise and returned to Payne, were for the accommodation of Payne and his associates to enable them by discounting the same to raise money for the improvement of the land. A warranty deed to said land was executed by Lloyd P. Gise on March 14, 1913, conveying the same to defendants in error A. M. Hewitt, Robert D. Taylor and said Payne as trustees. This deed and the abstract were delivered by said Gise to the Cotulla State Bank to be held in escrow in accordance with the contract.

On May 12, 1914, another contract, designated by the parties as an extension contract, was executed by Lloyd P. Gise as party of the first part and A. M. Hewitt and said Payne as parties of the second part. This extension contract, after referring to several of the provisions of the original contract, provides, that in consideration of the extension of the time of payment of the first two notes from the first day of June, 1914, to the first day of January, 1915, the party of the second part and his associates agree to pay all interest due on all of said notes on the first day of June, 1914; to pay the taxes for the year 1913, to pay said two notes with the interest due thereon on January 1, 1915; and to have at least 100 acres more of said land cleared and grubbed and put in a good state of cultivation by January 1, 1915; that upon the failure to make the payments above mentioned or to pay the

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remaining notes or interest thereon as the same became due thereafter, "then this contract together with the original contract shall become null and void and no further force and effect, and the party

of the second part and his associates agree to surrender possession of said premises free from any incumbrance to party of the first part, and the Cotulla State Bank is hereby authorized to deliver to said party of the first part the deed and abstract held in escrow, and the party of the first part will deliver to said party of the second part and his associates the seven signed notes by them now in his possession." This extension contract was also placed on record. In the meantime Payne and his associates had taken possession of the property and had expended on improvements thereon according to their testimony between $4000.00 and $5000.00. The value of these improvements according to the evidence introduced by plaintiff in error did not exceed $1,000.00 Payne and his associates, not having paid the interest or the notes due June 1, 1914, in accordance with the terms of the extension contract, Gise wrote the following letter to the Cotulla State Bank:

Girard, Kansas., June 3, 1914.

Cotulla State Bank,
Cotulla, Texas.

Gentleman:

Herewith the seven notes I received from H. C. Payne in the presence of your cashier. Beg to advise that parties

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signing same have refused to meet them. I am therefore returning them to you to hold until I can learn there is nothing against the land and they have vacated premises as per our last contract. Upon receipt of these, kindly return deed and abstract to me but hold notes until I advise you that everything is O. K., then deliver to A. M. Hewitt, Palmer, Ill., who claims to be President of the Company, but who in my opinion is a worse rascal than Payne. I wired him today (Hewitt) as follows regarding payment of interest and taxes June 1st: "Why no interest? Wire paid answer immediately. Leaving for Texas." I sent message collect, but he refused to pay charges nor would he answer. That is evidence enough for me that he is through. If you are tangled up in the matter, Judge Rouse of Carrizo Springs can straighten you out as he understands the whole situation.

Yours truly
L. P. Gise.

On June 4, 1914, Gise and his wife by deed conveyed said lands to Ward K. Gise, but notwithstanding said deed, he continued to act as owner thereof. He demanded and received possession of the lands from defendants in error. He took possession of and sold the wood which the latter had cut and corded upon the premises. He compelled the witness Luther, who had

purchased cattle from the defendants in error, to remove the same from the premises, and rented the lands to other parties. On June 26, 1914, he posted notices about the premises notifying parties not to remove any wood therefrom under penalty of being prosecuted to the full extent of the law and signed said notices as owner. He also

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had his attorney Rouse post such notices in his name as owner. On December 21, 1914, Gise wrote to the Cotulla State Bank requesting it to return to him the seven notes which he had sent them in his letter of June 3, 1914. The Bank, upon the receipt of this letter, returned the seven notes to him. On January 21, 1915, Millie K. Gise and Edgar K. Gise conveyed by deed the said lands to the plaintiff in error. On January 23, 1915, Millie K. Gise, Edgar K. Gise and plaintiff in error jointly executed and filed for record a declaration of interest in said lands stating therein that they claimed to be and are in fact the owners of undivided parts thereof. On February 12, 1915, plaintiff in error instituted this suit to recover upon the two notes mentioned. On August 7, 1915, Gise, still claiming and acting as the owner of said lands, had his attorney Rouse prepare a release or agreement to be executed by himself, Payne and Hewitt. This release, after reciting in substance the terms of the original articles of agrement forthe purchase of the lands and of the extension agreement, states as follows:

"Now, therefore, this is to certify that the conditions expressed in said contracts as above referred to and recorded herein, not having been complied with by the said second party and his associates, and the said land having been by said Second Party surrendered to said

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First Party and said First Party having been put in possession of same by said Second Party, and no incumbrance being against said land at said time, it is mutually agreed by and between the parties to said contracts herein referred to and recorded as aforesaid, that each of said contracts be cancelled and held for naught, and that all obligations arising under them or either of them, be annulled, and that if any cloud has been cast

upon the title to said land by reason of said contracts or either of them, that the same is hereby removed, cancelled and held for naught."

This release was signed and acknowledged by Payne and Hewitt and delivered to Gise, who, however, never executed it. There is some evidence that Gise, through his agent or attorney, requested Payne and his associates or some of them to execute a quitclaim deed or deeds of the premises to him. Payne testifies that a party came to him while he was sick in bed and requested him to sign such quitclaim deed, but he was too ill to execute it at that time and the party took the deed away with him. No such quitclaim deeds, however, were executed by Payne and his associates.

Plaintiff in error contends that Payne and his associates having taken possession of the lands in question under the articles of agreement became vested with an equitable title therein and that

there had been no redelivery of title to Gise, the vendor, because such a transfer or resale of lands to the original owner or vendorby one in possession under a contract of purchase is within the statute of frauds and must be in writing. Catlett vs Dougherty, 129 Ill. 431. It is also claimed that plaintiff in error is a **bona fide** holder for value in due course without notice of the notes sued upon. Plaintiff in error having permitted the title originally to be placed in Gise and having given him unlimited authority to deal with and sell said lands as if he was absolute owner thereof, is as much bound by his acts as if she herself had done them. She was also kept informed by Gise of the transactions as they took place. She from no point of view can be held to be an innocent holder of said notes in due course. Neil vs Cummings, 75 Ill. 170. The original articles of agreement and the extension contract must be considered together as one contract. Gise himself and not the defendants in error rescinded and forfeited the contract. He exercised the option therein to declare the contract void and repossessed himself of the lands. As soon as he did this the consideration for the notes failed, as he could not rescind the contract and at the same time recover the purchase price

of the lands evidenced by the notes, and if he could not do so, neither could his assignee, plaintiff in error. Want or failure of consideration may be shown under the plea of general issue to

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notes introduced under the common counts. Clarke vs Newton, 235 Ill. 530. The release of August 7, 1915,, prepared and presented by said Gise and executed by Payne and Hewitt and acknowledged by them was sufficient to release any equitable title held by defendants in error in the lands by virtue of said contract of purchase. It is true that Gise failed to sign this release agreement, but neither he nor plaintiff in error, his assignee of the notes, can now be heard to say that because he did not sign the release agreement which he himself prepared and requested after having rescinded the contrat, that defendants in error had not released their epuitable title to the lands by an instrument in writing and are therefore barred from their defense to the notes by the statutes of fauds. In the case of Dougherty vs Catlett, **supra,** it was said, "The plaintiff contends that the acts performed by him under his oral contract to sell and surrender his interest in said lands to the defendant constitute such a performance as should take the case out of the statute. The only act of performance alleged in the declaration is the delivery of possession of the premises sold to the defendant. There is no allegation of any cancellation or surrender of the defendant's contract to convey the lands to the plaintiff on payment of the purchase money, nor is the cancellation of said contract averred, either directly or inferentially. It will therefore be persumed that said contract is

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still held by the plaintiff as a valid and subsisting legal obligation against the defendant." In that case no question of rescission or forfeiture was involved but the declaration declared upon an absolute sale of the equitable interest in the land. In the case at bar, there was not only a recission and cancellation of the contract to convey but the rescission and cancellation were declared by plaintiff in error through said Gise. Under the circumstances shown, if any evidence

in writing showing that defendants in error had released their equitable interests in the lands was necessary, then the release agreement executed by Payne and Hewitt was sufficient. The release agreement was an instrument of as much dignity as the contract of purchase and was as efficient in releasing the interests of defendants in error in the land as the latter was in granting them. It was as effectual for this purpose as a quitclaim deed would have been. It was drawn at the instance of said Gise in the form of an agreement between himself and Payne and Hewitt to be signed and acknowledged by all of them, and Gise could not, after it had been executed and delivered to him by the other parties, destroy its force and validity by simply withholding his own execution thereof.

The judgment of the Circuit Court is affirmed.

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GEN. NO. 6738. OCT TERM A. D. 1917. AG. NO. 5.

FRANK DICK, et al. Appellants,

vs.

212 I.A. 636

M. F. AMBROSIUS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ADDIE DICK, DECEASED, et al., Appellees.

Appeal from Circuit Court Cass County.

ELDREDGE P. J.

Appellants filed their bill in the Circuit Court of Cass County to contest the will of Addie Dick, deceased. The will was sustained by the verdict of the jury and a decree entered to that effect, to reverse which this appeal is prosecuted.

Five errors are assigned for the reversal of the decree. The first three go to the admission of the testimony of the witnesses Lillian Sellers, Ernest Sellers, and Lulu Munson. The fourth is that the court erred in excluding a certain conversation between the witness Dr. Roy H. Garn and Lillian F. Ambrosius, on the evening that the will was executed, and the fifth that the court erred in entering the decree and refusing to grant a new trail. No argument is presented in regard to the fourth and fifth errors assigned and they must be deemed as waived. The testimony of the witnesses Lillian Sellers and

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Lulu Munson was objected to on the ground that they were legatees under the will, and to the testimony of Ernest Sellers because he was the husband of Lillian Sellers, a legatee under the will, which would therefore make him incompetent.

Lillian Sellers and Lulu Munson were each bequeathed a trivial bequest of personal property under the will and each filed a written renouncement thereof in the County Court. Before these witnesses were permitted to testify before the jury, each was first examined on her **voire dire** to ascertain if the renouncements were made in good faith and not solely for the purpose of testifying. Each denied that she renounced for the purpose of qualifying herself as a witness and no proof was offered to

show that the renouncements were not made in good faith. The presumption is that one offered as a witness is competent to testify and the burden is upon the one who objects to state and prove the grounds of his objection. Boyd vs McConnell 209 Ill. 398; Campbell vs Campbell 130 Ill. 473. The interest which determines the competency of a witness is whether he would gain or lose as the direct result of the suit. Wetzel vs Firebaugh 251 Ill. 190; Campbell vs Campbell **supra.** A witwill not be excluded on the ground of interest if the question of his interest is in doubt. Campbell vs

Campbell, **supra.** No evidence was produced tending to show that the witnesses in question renounced for the purpose of making themselves competent witnesses in this suit and the Chancellor ruled that their evidence was competent. The competency of the witness Lillian Sellers having been determined, Ernest Sellers her husband also became a competent witness.

The jury who heard all the evidence found in favor of sustaining the will and we find no reason for disturbing its verdict. The decree will be affirmed.

212 I.A. 636

GEN. NO. 6750. OCT. TERM A. D. 1917. AG. NO. 8.

PEARL LUTHER, Appellee.

vs

C. C. BOWMAN, et al., Appellants.

Appeal from Circuit Court McLean County.

ELDREDGE P. J.

On February 15, 1916, appellee had a judgment by confession for $3,096.50 entered in the Circuit Court of McLean County on a judgment note dated August 1, 1915, for the principal sum of $3,000.00 payable to the order of William Luther on or before April 1, 1916, with interest at six per cent from date. The note had the usual power of attorney to confess judgment for the principal, interest, costs, and attorney's fees. The amount of attorney's fees was not named and the confessd judgment did not include any attorney's fees. The note was endorsed on the back as follows, "Pay to the order of Pearl Luther, William Luther." The name "Pearl Luther" also appears on the back of the note. Subsequently, the judgment was opened up and appellants given leave to plead. William Luther, the payee in the note, is the husband of appellee. On May 13, 1916, appellant filed the plea of general issue and four special pleas. The first special plea avers

that appellee was not an innocent purchaser for value from her husband and that her husband at the commencement of the suit was and still is indebted to appellants in the sum of $500.00, which they offer to set off and allow appellee in payment of any sum that might be found due on her note. The second special plea denies that appellee was an innocent holder of the promissory note for value but took the same with full knowledge of all facts and circumstances under which the note was given and subject to all defenses which defendants had to said note and avers a failure of consideration therefor. The third special plea denies that appellee was a **boni fide** holder of said note for value before maturity, and avers that the same was assigned to her without any consider-

ation, for the sole purpose of taking judgment thereon and sets up a failure of consideration. The fourth special plea is substantially the same as the third except that it sets up a failure of consideration as to the sum of $500.00. On November 18, 1916, appellants filed their joint affidavits in which they state upon information and belief that William Luther did not assign said note to his wife for a valuable consideration before maturity and without notice of the defenses to said note in the hands of William Luther, original payee; that Pearl Luther is not a **boni fide** assignee of said note before maturity for a valuable consideration and without notice of said defenses;

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and "that said pretended assignment of said note alleged to have made Luther and his wife before maturity without consideration and with full knowledge on her part of the defenses which defendants have against said note in the hands of William Luther", and that said pretended assignment was not made in good faith but for the sole and only purpose of attempting to enable William Luther to obtain a collection thereof in his wife's name so as to cut off defendant's legal defenses to said note available to them if he had sued in his own name.

It is claimed that the affidavit is a verification of the special pleas and that the burden of proof was upon appellee to show that she was a **bona fide** assignee of the note for value without notice, and that the court erred in admitting the note in evidence without compelling appellee to first make such proofs. The affidavit does not verify anything. It was not filed with the pleas but many months after the pleas were filed, and, so far as the record discloses, without leave of court. It does not refer to any plea, is made wholly upon information and belief, and the latter part of it, at least, is unintelligible. It neither states that the facts set out in any plea are true, nor are any facts set out therein with an averment of their truth. It presents but a series of conclusions based upon information and belief. It is not such verification as is intended by section

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52 of the Pract-

ise Act. Bailey vs Valley National Bank 127 Ill. 332; Brewer & Hoffman Brewing Co. vs Boddie 59 Ill. Ap. 45. The undisputed proofs show that appellee inherited twenty acres of land from her grandfather's estate which she subsequently sold for $5,000.00, of which she received $4,000.00 in cash and a note for $1,000.00. She loaned her husband the $4,000,00 in cash with which he entered into the deal with appellants and that when her husband received the $3,000.00 note in question, executed by appellants, he assigned it to her as a part payment on her loan to him of the $4,000.00. The evidence shows that appellee was a **bona fide** assignee of the note for value before maturity and without notice. We are also satisfied from the proofs in the record that there was no failure of consideration, either total or partial, of the note and that the verdict of the jury is consistent with the manifest weight of the evidence.

Appellee has assigned a cross error that the trial court erred in not fixing the amount of the attorney's fees provided for in the note and including the same in the judgment. The judgment by confession was originally taken February 15, 1916 for the amount only of the principal and interest due. No specific amount of attorney's fees is named in the note and no attorney's fees were included in the judgment. On February 21, 1916, the plaintiff, by her attorneys, filed

a written motion for the court to set a day and hour for the hearing of testimony to determine the amount of a reasonable attorney's fee under the cognovit to be fixed by the court after such hearing. The court never passed upon this motion, but subsequently during the trial at the November Term A. D. 1916, plaintiff offered proof before the jury for the amount of a reasonable attorney's fee. These proofs were admitted and later excluded by the court ,and an instruction permitting the jury to assess a reasonable attorney's fee for appellee was refused. A promissory note, containing a warrant of attorney with power to confess judgment for an attorney's fee, rests upon a valuable consideration, passes by the assignment of the note as an incident to the main debt and the assignee may recover such fee, "in an action on the note or

[illegible] Ct. [illegible] Kan. [illegible] Pac. 127 Ill. 322; Brewer v. Hoff [illegible] Co., [illegible] 20 Ill. App. 15. The undisputed [illegible] that appellee had rented twenty acres of land from her [illegible] husband's estate which she subsequently [illegible] $50,000.00, of which she received $41,000.00 in cash and a note for $1,000.00. She loaned her husband [illegible] in cash, with which he entered into the deal with [illegible] and that when her husband received the [illegible] exception, excepted by appellants, he [illegible] to [illegible] part payment on her loan to him [illegible]. The evidence shows that appellee was a loan [illegible] of the note for value before maturity and without [illegible]. We are also satisfied from the p[illegible] in the [illegible] that there was no fault or [illegible] and that the verdict of the jury is consistent with the manifest weight of the evidence.

Appellee has assigned a cross-error [illegible] the trial court erred in not [illegible] the attorney's fees provided for in the note and [illegible] the same in the judgment. The [illegible] originally taken May 15, 1916, [illegible] only of the principal and interest due. No [illegible] of attorney's fees is [illegible] in the [illegible] fees were included in the judgment. On [illegible] 21, 1916, the plaintiff, by [illegible] as follows:

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[illegible]

[illegible] for [illegible] and [illegible] the [illegible] of [illegible] the [illegible] to [illegible] the [illegible] for such hearing. The court never passed upon this [illegible] but [illegible] the [illegible] at the [illegible] term [illegible] A. D. [illegible] initiative [illegible] and before the jury for [illegible] of a [illegible] fees. These proceedings [illegible] and [illegible] the [illegible] upon the [illegible] jury to assess a reasonable attorney's fee for appellee [illegible] A. D. [illegible] proceedings, [illegible] in a [illegible] with power to [illegible] for an [illegible] upon a [illegible] allowance by the [illegible] of the [illegible] and the assessment may [illegible] of

in a seperate action brought after suit on the note." Keenan vs Blue 240 Ill. 187. If counsel for appellee had made a motion to have a reasonable attorney's fee fixed when the judgment was taken by confession and had offered proofs in regard thereto at that time, the court undoubtedly would have fixed such fee and included the amount in the judgment. This was not done however but five days after the judgment was confessed. counsel for appellee filed a written motion to have a reasonable attorney's fee fixed by the court. There is nothing in the record to show that this written motion was ever called to the atten-

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tion of the court until the trial of the case before the jury at a subsequent term. The original judgment had not been vacated or set aside but opened up only with leave to the appellants to plead to the declaration, and stood as security for the debt. It is stated in the final judgment of the court, after overruling the motion for a new trial, "that the judgment heretofore rendered by this court on February 15, 1916, in favor of said plaintiff, Pearl Luther, and against the defendants, C. C. Bowman and Edna B. Bowman, for the sum of $3,096.00 stands in full force and effect as of the date of the rendition of said judgment, etc." Where the warrant of attorney contains power to confess judgment for an attorney's fee without naming the amount thereof, the fee must be fixed by the court. Campbell vs Goddard 117 Ill. 251. There can be, however, but one judgment in the same action brought. The holder of a judgment note cannot at one time take judgment by confession for the amount due on the note for the principal and interest, and then at a later day in the same action have this judgment vacated or modified and another judgment entered including an attorney's fee. The atorney's fee should be fixed before the judgment is entered and the amount thereof included therein. The cross error of appellee cannot be sustained.

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Other cross errors have been assigned by appellee, but, in view of what has already been expressed in this opinion, it is unnecessary to consider them. The judgment of the Circuit Court is affirmed.

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GEN. No. 6771. OCT. TERM A. D.1917. AG. NO. 12.

FARMINGTON HORSE COMPANY,

Plaintiff in Error,

212 I.A. 636

vs

ESTATE OF ANDREW J. JACOBUS, DECEASED,

Defendant in Error

ELDREDGE P. J.

Plaintiff in error filed a claim in the County Court of Fulton County against the estate of Andrew J. Jacobus, deceased, to recover for the value of a horse and of certain baled hay, straw and feed with interest thereon, destroyed while located in a barn claimed to have been set on fire by Jacobus in his lifetime. The total abount of the claim is $2,846.05. The defence was that the claim was barred by the statute of limitations. This case was tried by the court without a jury at the same time and upon the same evidence as the case of **Short** vs **Estate of Andrew J. Jacobus,** deceased, heard at this term of court. Reference is made to the opinion in the **Short** case for the facts and the issues involved. The determination of this case is controlled by that in the **Short** case and the judgment of the Circuit Court is affirmed.

Mr. Justice Waggoner took no part in the decision of this case.

GEN. NO. 6774. OCT. TERM A. D 1917. AG. NO. 14.

PEOPLE OF THE STATE OF ILLINOIS

212 I.A. 636

Defendants in Error,

vs

FRANK RUDOLPH, Plaintiff in Error.

Writ of Error to County Court Sangamon County

ELDREDGE P. J.

Plaintiff in error was convicted in the County Court of Sangamon County under the second count of an information filed by the State's Attorney, which charged in substancce that he did then and there knowingly, wilfully encourage one Essie Day, a female child under the age of eighteen years, to become a delinquent child, contrary to the form of the statute, etc.

It is urged that the court erred in not quashing this count for the reason that it does not charge a crime in that it fails to allege that Essie Day was or became delinquent, and does not state in what way plaintiff in error contributed to the delinquency nor to what act of delinquency he contributed. The offense charged does not exist at common law but is created by statute and is a misdemeanor punishable by fine and imprisonment in the county jail or by both. (Secs. 1. and 2 of "An Act to define and punish the crime of contributing to the delinquency of children," approved and in force

June 25, 1915, Hurd's R. S. 1915—1916, Page 874). It was held in t he case of West vs People 137 Ill. 189, "Multiplication of authorities will be unnecessary, for it will be found, upon examination, in this state and elsewhere, that while the general rule is, that it is sufficient to state the substantive elements of the crime in the language of the statute creating the offense, yet in cases of felony the indictment must, either by statutory description or by other apt averment, so identify the offense as to meet the requirements of the constitution." The same rule is applied to misdemeanors, People vs. Schreiber, 250 Ill. 345. The sections of the statute upon which the information is based are as follows:

"42hm. DEFINING DELINQUENT CHILD. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That for the purpose of this Act a delinquent child is any male who while under the age of seventeen (17) years, or any female who while under the ageof eighteen (18) years violates any law of this State or is incorrigible, or knowingly associates with thieves, vicious or immoral persons; or without just cause and without the consent of its parents, guardian or custodian, absents itself from its home or place of abode, or is growing up in idleness or crime; or knowingly

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frequents a house of ill repute; or knowingly frequents any policy shop or place where any gambling device is operated; or frequents any saloon or dram shop where intoxicating liquors are sold; or patronizes or visits any public pool room or bucket shop; or wanders about the streets in the night without being on any lawful business or lawful occupation: or habitually wanders about any railroad yards or tracks or jumps or attempts to jump onto any moving train; or enters any car or engine without lawful authority; or uses vile. obscene, vulgar, profane or indecent language in any public place or about any school house; or is guilty of indecent or lascivious conduct."

"42hn. CONTRIBUTING TO DELINQUENCY - Penalty. 2. Any person who shall knowingly or wilfully cause, aid or encourage any male under the age of seventeen (17) years, or any female under the age of eighteen (18) years to be or to become a delinquent child as defined in Section one (1). or who shall knowingly or wilfully do acts which directly tend to render any such child so delinquent and who when able to do so, shall wilfully neglect to do that which will directly tend to prevent such state of delinquency, shall be deemed guilty of the crime of contributing to the delinquency of children, and on conviction thereof shall be punished by a fine of not more than two hundred (200) dollars, or by imprisonment in the county jail, house of correction or

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workhouse, not more than one (1) year, or by both such

fine and imprisonment."

Section One enumerates many different acts, the commissionof any one of which by a child causes it to be deemed delinquent. One of the objects of an indictment or information is to appraise the defendant of what offense he is charged so that he may be able to prepare and make his defense thereto. Section Two of the act provides that one may be deemed guilty of the crime of contributing to the delinquency of children under three different circumstances, viz., (1) when one shall knowingly or wilfully cause, aid or encourage any male under the age of seventeen years or any female under the age of eighteen years to be or become a delinquent child "as defined in Section One;" (2) or who shall knowingly or wilfully do acts which directly tend to render any such child delinquent; (3) and when able to do so, shall wilfully neglect to do that which will directly tend to prevent such state of delinquency. The count under consideartion is based upon the first group of circumstances mentioned—that the plaintiff in error knowingly and wilfully encouraged Essie Day to become a delinquent child as defined in Section One, but the count makes no reference to any of the definitions of a delinquent child, set out in Section One. There is no direct averment that Essie Day

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did in fact become a delinquent child. The count should have contained averments that Essie Day became a delinquent child, the acts which she committed bringing her within one or more of the definitions of a delinquent child and that plaintiff in error knowngly or wilfully caused, aided or encouraged her to commit such acts. The count neither states the offence in the terms and language of the statute nor so plainly that the nature thereof may be easily understood. The motion to quash the second count of the information should have been sustained.

The judgment of the Circuit Court is reversed and remanded.

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27a

GEN. NO. 6778. OCT TERM A. D. 1917. AG. NO. 74.

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendants in Error. 212 I.A. 637

vs

JASPER DAVIS, Plaintiff in Error.

Error to County Court Champaign County.

ELDREDGE P. J.

Plaintiff in error was convicted upon an information charging him with selling liquor in anti-saloon territory. On the trail the following certificate was introduced in evidence:

State of Illinois,
County of Champaign, SS
Town of Champaign.

I, Harry King, Clerk of the Town of Champaign, in said County and State, do hereby certify that at an election held in the Town of Champaign on the 7th day of April A. D. 1908, the question, "SHALL THIS TOWN BECOME ANTI-SALOON TERRITORY," was voted on in said Town of Champaign and that the returns of said election were duly canvassed as the law directs, and said returns so canvassed show that upon said election there was voted 1396 votes "YES" and 1391 votes "NO".

Witness my hand and seal this 24th day of May A. D. 1917.

(SIGNED) HARRY KING (Seal)
Clerk of the Town of Champaign.

Similar certificates were also introduced showing the result of the elections in the town of Champaign on April 7, 1908, April 5, 1910,

April 2, 1912, and April 7, 1914, upon the question "SHALL THIS TOWN CONTINUE TO BE ANTI-SALOON TERRITORY." Each of the later certificates showed an affirmative vote upon the proposition mentioned therein. Plaintiff in error objected only to the first certificate on the ground that it was not the best evidence. No objections were made to the introduction of the other certificates. Section 7 of the Losal Option Act, in force July 1, 1907, specifically pro-

vides that the result of such elections may be proved in all courts and in all proceedings by the official certificate of the clerk. The statute does not require a certified copy of the record. This question has been twice passed upon and must be considered **stare decisis.** People vs Danley 181 Ill. Ap. 80; People vs Willi 147 Ill. Ap. 207.

Error is also assigned on the refusing to give instructions "A" and"B." Instruction "B" was fully covered by given instruction 9. There was no error in refusing to give instruction "A" because it was not qualified by including a statement that it was the duty of the jurors to follow the instructions of the court as to the law unless they could say upon their oaths that they knew the law better than the court.

There is no error in the record and the judgment is affirmed.

25a

GEN. NO. 6780. APRIL TERM A. D. 1918. AG. NO. 1.

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendants in Error.

vs

212 I.A. 637

WILLIAM HUMBLE, Plaintiff in Error.

Writ of Error to Circuit Court McLean County.

ELDREDGE P. J.

Plaintiff in error was indicted and convicted for the crime of assault with a deadly weapon in the Circuit Court of McLean County and sentenced to pay a fine of $100.00 and costs.

It is first insisted that the judgment should be set aside on the ground that one of the jurors was disqualified because he was at the time a deputy sheriff. It appears that the juror was appointed deputy sheriff in August, 1916, but had never performed any official duties. He was a merchant residing in the village of Coltax over twenty miles from Bloomington and was commonly known as a "country deputy sheriff." He was not an active deputy sheriff connected with the sheriff's office in Bloomington. While the statute exempts sheriffs from jury duty, it dose not prohibit them from acting as jurors if accepted as such by the parties. It is claimed however that plaintiff in error had no knowledge that the juror was such deputy sheriff until after

the case had been tried. It was the duty of plaintiff in error to ascertain the competency of the juror by examination. In criminal cases under the laws of this state, a very wide scope is allowed in the examination of jurors to ascertain their competency and a verdict will not ordinarily be disturbed after there is a neglect to do so, unless manifest prejudice has resulted thereby to the defendant. Chase vs People, 40 Ill. 352.

It is also urged that the court erred in permitting an attorney employed by the prosecuting witness to assist the State's Attorney in the trail. This rested within the discretion of the Court. Hayner vs People, 213 Ill. 142; People vs Hartenbower 283 Ill. 591. It is contended

however that counsel for plaintiff in error thought that the attorney had been legally appointed by the court to assist the State's Attorney and did not know that this had not been done until after the verdict was rendered. It was his duty to ascertain that fact, if he deemed it important, and to object to the attorney acting in the case. No objection was made and it is too late to raise it after the verdict is rendered. Parties cannot complain of alleged errors on the ground that they did not know that they existed at the time when the slightest diligence on their part would have discovered and obviated them.

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Remarks of the prosecuting attorney in his argument to the jury are complained of. Objections were sustained to them, the jury instructed to disregard them and they were not of such a character under the facts in this case as would justify a reversal of the judgment.

There was no reversable error in the instructions, and, while the evidence was conflicting, it was for the jury to determine the facts and we are not inclined to disturb its verdict in regard thereto.

The judgment of the Circuit Court is affirmed.

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GEN. NO. 6782. OCT. TERM A. D. 1917. AG. NO. 17.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel C. S. Welch, et al., Plaintiff in Error.

212 I.A. 637

vs

MOULTRIE COUNTY, ILLINOIS, et al., Defendants in Error.

Error to Circuit Court Moultrie County.

ELDREDGE P. J.

Appellants filed their amended petition in the Circuit Court of Moultrie County, which avers in substance that the Superintendents of Highways of Shelby and Moultrie Counties, respectively, in their official capacities prepared a "bridge" inspection report, a copy of which is attached to the petition, which was submitted to the Illinois Highway Commission, which prepared plans and specifications for "said bridge"; that the matter of building "said bridge" was presented to the Board of Supervisors of Shelby county, September 3, 1914; that said Board then and there decided to build "said Bridge", and, in the furtherance of the building thereof, passed the following resolution: "Mr.Roessler moved that the bridge on the county line, between Shelby and Moultrie county, east of Findlay, be built; and that this Board appropriate the sum of Ten Thousand ($10,000.00) Dollars as Shelby county's ,

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part in the building of said bridge. Motion carried." The petition then proceeds as follows: "Thereby expressing the desire of Shelby County to build a bridge across the Kaskaskia River upon the boundary line between Moultrie County and Shelby County; the cost of such bridge being equal or exceeding $5,000.00; and the said Shelby County, Illinois, at the said date appropriated its estimated share of the cost of construction said bridge in the sum of Ten Thousand ($10,000.00) Dollars, which said sum of Ten Thousand ($10,000.00) Dollars was duly collected as taxes by the said County of Shelby and deposited with, and is now in the possession of the Treasurer of said county, being held by him for the

purpose of building the bridge on the county line between Moultrie and Shelby County as aforesaid, and for no other purpose."

The petition then avers that the Board of Supervisors of the County of Moultrie were duly advised of the action of the County of Shelby in making the appropriation and levy aforesaid; that the County Superintendent of Roads of said county was also notified of the action of said Board; that the Board of Supervisors of Moultrie County appointed a committee to confer with the Board of Supervisors of Shelby County in reference to the construction of said bridge, but that the committee appointed by the Board of Supervisors of Moultrie County advised the Board of Supervisors of Shelby County that the county of Moultrie could

not and would not make the appropriation to raise the money to construct said bridge and that said Moultrie County, by and through its Board of Supervisors, has failed and does refuse to make any appropriation for Moultrie County's proper porportion of the costs of constructing the proposed bridge; that the old bridge is in a dilapidated condition and unfit to be used by the public and that the absence of the new bridge is a great inconvenience to the people and a financial detriment and loss to them and to said petitioners in that it prevents them from having access to the markets of Sullivan, Moultrie County, and of Findlay, Shelby County.

The petition prays for a writ of mandamus to compel Moultrie County and the supervisors thereof to make an appropriation for Moultrie County's proportion of the cost of the bridge on the basis of the said property, both real and personal, of the said Counties of Shelby and Moultrie, according to the last preceeding assessment thereof as equalized, and that said Board take such other and further steps as in necessary for the levy and collection of said money and for the construction of said bridge, etc.

The trail court sustained a special demurrer to the petition and the only question presented by the record is whether the petition

is sufficient to authorize the writ of mandamus prayed for. The action is based upon Section 36, Article V of, "An Act to revise the law in relation to roads and bridges," in force July 1, 1913. This section provides that bridges over streams that divide counties and bridges on roads on county lines and bridges within eighty rods of county lines shall be built and repaired at the expense of such counties and when the cost of constructing the same shall be $5,000.00 or over, shall be built by such counties, respectively, in proportion that the taxable property in each county, respectively, bears to each other, according to its assessed value as equalized at the time of constructing such bridge; that when any county desires to build such bridge the cost of which will equal or exceed $5,000.00 and has appropriated its share of the cost of constructing the same, then it shall be the duty of such other county to make an appropriation for its proportion of the cost of said bridge on the basis aforesaid, and if such other county fails or refuses so to do, a court of competent jurisdiction shall issue an order to compel it to make such appropriation upon a proper petition for that purpose.

It is elementary that a petition for mandamus must show on its face a clear right to the relief demanded and must set forth all material facts so that the same may be admitted or traversed. People vs Glann 70 Ill. 232; People vs Trustees 86 Ill. 613; Brokaw vs Com-

missioners 118 Ill. 239; Board of Supervisors vs People 118 Ill. 459. Mere conclusions are not sufficient. Stott vs Chicago, 205 Ill. 281; People vs Madison County 125 Ill. 334; Board of Supervisors Stark County vs People 110 Ill. 577.

The only material affirmative fact set out in the petition is the resolution of the Board of Supervisors of Shelby County. The bill does not aver in fact where the bridge is to be built nor over what stream. There is no averment as to what the cost of the bridge would probably be, that any estimate of the cost has ever been made nor what the estimated share of Moultrie County of the cost thereof would be. That part of the petition above quoted, "Thereby expressing the desire of Shelby

County to build a bridge across the Kaskaskia River upon the boundary line between Moultrie County and Shelby County; the cost of such bridge being equal or exceeding $5,000.00 etc.," is but a pure conclusion of the pleader as to what was meant by the resolution passed by the Board of Supervisors of Shelby County. The petition is most inartificially drawn and the Court did not err in sustaining the demurrer thereto. The judgment of the Circuit Court is affirmed.

Filed July 15, 1918

27a

GEN. NO. 6785. OCT. TERM A. D. 1917. AG. NO. 20.

A. M. HEWITT, Administrator of the Estate of Nancy F. Hewitt, Plaintiff in Error,

vs

LYDIA A. HAINES and FLETCHER HAINES, Defendants in Error.

212 I.A. 637

Error to Circuit Court Christian County.

ELDREDGE P. J.

This is an appeal to reverse the decree of the Circuit Court of Christian County, whereby the bill of plaintiff in error, which was filed for the purpose of obtaining an accounting of the rents of certain lands, was dismissed for want of equity.

This inception of this litigation dates back to the case of Haines vs Hewitt, 129 Ill. 345, to which reference is made for a preliminary statement of the facts on which the present suit is based.

The present bill was originally filed by Nancy F. Hewitt in February, 1887, but, the files having become lost, she obtained leave to substitute copies thereof on January 20, 1888. The original bill avers that Thomas Anderson died in April, 1866, leaving as his only heirs at law, the complainant, Nancy F. Hewitt, and the defendant, Lydia A. Haines, who is married to Fletcher Haines; that at the time of the death of said Thomas Anderson, Nancy F. Hewitt was only nine months old and that she and her sister Lydia Haines inherited in fee from

their father, Thomas Anderson, certain real estate; that said defendants Lydia Haines and Fletcher Haines have had the exclusive use, control and possession of a certain part of said real estate and have failed and refused to pay or account to the complainant for the said rents and profits thereof; that complainant attained her majority on the thirteenth day of July, 1883, and that said lands described had never been divided between her and said Lydia Haines until February 22, 1886, and prays that an accounting be had of the rents and profits of said lands so held by defendants until they were partitioned.

On March 5, 1888, the defendants demurred to the

bill. On August 6, 1888, the demurrer was overruled. Nothing more was done in the case until August 1, 1892, when the death of the complainant Nancy F. Hewitt was suggested, but no administrator of her estate was substituted as complainant. The bill then lay passive for twenty-three years until September 29. 1915, when the defendants were defaulted and a money decree rendered against them for the sum of $825.00 and costs of suit. This decree was entered at a time when there was no complainant to the bill, and on November 1, 1915, on motion of the defendant, the decree was vacated and set aside. On April 24, 1916, Marshall Hewitt, administrator of the estate of Nancy F. Hewitt, was substituted as complainant in said cause. On

August 28, 1916, the defendants made a motion to dismiss said bill on the ground that the complainant had been guilty of such laches that it would be unjust and inequitable to require them to answer the same, and for the further reason the complainant is barred by the statute of limitations from prosecuting said suit as administrator, which motion was overruled. On October 26, 1916, the defendants having been ruled to answer, filed their joint and several answers thereto in which it is alleged, among other things, that Nancy F. Hewitt, died December 15, 1891, leaving her surviving, her husband, A. M. Hewitt, and two children and that said A. M. Hewitt, the complainant, did not take out letters of administration until March, 1916, and that said complainant is estopped by his laches from further prosecuting this suit, as, by reason of said delay, necessarily all parties having knowledge of the facts have long since died and it would be unjust and inequitable to permit the further prosecution of this suit, after so many years of delay in the prosecution of the same.

Nancy F. Hewitt waited for over four years after she attained her majority before she filed the original bill. She lived four years thereafter, during which time she did nothing towards prosecut-

ing the bill. No administrator was appointed for her estate nor sub-

stituted as party complainant for nearly twenty-five years. Plaintiff in error did not amend the bill to show any facts which tenderd in any way to excuse the delay in prosecuting the same. The defendants, by their motion and by their answer, set up the defense of laches. When the answer was filed setting up the defense of laches, it then devolved upon plaintiff in error to amend his bill and set out facts which would excuse the laches. Fitch vs. Miller, 200 Ill. 170. There has been a most unreasonable and unexplained delay in the prosecution of this suit and, so far as appears from the record, not caused by any fault of the defendants. Parties who are not diligent in asserting their rights must offer some excuse for the delay, and unreasonable delay, not explained by equitable circumstances, will bar relief. Blaul vs Dalton 264 Ill. 193. Twenty-eight years elapsed from the time the suit was brought until any steps were taken to prosecute it to a final decree. After such a lapse of time, there is necessarily great difficulty in ascertaining the exact facts as to the matter in controversy. Stale claims are not encouraged in equity and the defense of laches will be sustained even against a trustee. McMeen vs Grant 268 Ill. 64.

The decree of the Circuit Court, dismissing the bill for want of equity, is affirmed.

28 C

GEN. NO. 6788. OCT. TERM A. D. 1917. AG. NO. 23.

WILLIAM E. YOUNG, et al, Appellants

vs

EMMA SMITH, et al, Appellees.

212 I.A. 638

Appeal from Circuit Court Douglas County.

ELDREDGE P. J.

This is a bill in chancery, filed by appellants, to have a certain deed declared a mortgage, for the right to redeem therefrom and for an accounting.

The only averments in the bill, which allege any right, title, or interest of the complainants in the subject matter of the suit, are contained in the first paragraph thereof and are as follows:

Your orators, William E. Young, James W. Young, Alfred H. Young, John E. Young, Daily A. Young, and Luther E. Young and your oratrices Hazel G. Young, Lula A. Young and Mary I. Young; and your orators, Jesse L. Young and Orval M. Young infants, by Mary I. Young, their next friend, and your oratrix Ina M. Young, and infant by Mary I. Young, her next friend, all of the city of Decatur, County of Macon ,and State of Illinois, respectfully show unto the court that on or about the first day of September A. D. 1912, one Lucian D. Young, who was then and there the husband of your oratrix

Page 1

Mary I. Young, and the father of the complainants herein, being indebted to one J. W. Smith in the sum of $300.00 which said indebtness was evidenced by a certain mortgage deed given to secure a certain promissory note of even date therewith for said sum of Three Hundred ($300.00) Dollars, as will more fully appear by the said note and mortgage ready to be produced in Court."

There is no averment in the bill that Lucian D. Young is dead, and if dead, whether he died testate or intestate or whether the complainants mentioned are his only heirs at law. ~~And further, there is absolutely no proof in the record of any of these facts and none of them are alleged or admitted in the answers of the defendants. So far as appears from the pleadings and proofs in this case, none of the complainants have any~~

subject ~~interest in the matter of the bill~~

Even if it were a fact that Lucian D. Young was dead when the bill was filed and had died intestate, leaving Mary I. Young, his widow, and the other complainants named as his children and only heirs at law, and these facts, had been alleged and proved the other facts in evidence are not so clear, satisfactory, and convincing as to justify the conclusion that the deed was intended to be a mortgage.

The decree of the Circuit Court, dismissing the bill for want of equity is affirmed.

GEN. NO. 6788. OCT. TERM A. D. 1917. AG. NO. 23.

WILLIAM E. YOUNG, et al, Appellants

vs

EMMA SMITH, et al, Appellees.

212 I.A. 638

Appeal from Circuit Court Douglas County.

ELDREDGE P. J.

This is a bill in chancery, filed by appellants, to have a certain deed declared a mortgage, for the right to redeem therefrom and for an accounting.

The only averments in the bill, which allege any right, title, or interest of the complainants in the subject matter of the suit, are contained in the first paragraph thereof and are as follows:

Your orators, William E. Young, James W. Young, Alfred H. Young, John E. Young, Daily A. Young, and Luther E. Young and your oratrices Hazel G. Young, Lula A. Young and Mary I. Young; and your orators, Jesse L. Young and Orval M. Young infants, by Mary I. Young, their next friend, and your oratrix Ina M. Young, and infant by Mary I. Young, her next friend, all of the city of Decatur, County of Macon ,and State of Illinois, respectfully show unto the court that on or about the first day of September A. D. 1912, one Lucian D. Young, who was then and there the husband of your oratrix

Mary I. Young, and the father of the complainants herein, being indebted to one J. W. Smith in the sum of $300.00 which said indebtness was evidenced by a certain mortgage deed given to secure a certain promissory note of even date therewith for said sum of Three Hundred ($300.00) Dollars, as will more fully appear by the said note and mortgage ready to be produced in Court."

There is no averment in the bill that Lucian D. Young is dead, and if dead, whether he died testate or intestate or whether the complainants mentioned are his only heirs at law. And further, there is absolutely no proof in the record of any of these facts and none of them are alleged or admitted in the answers of the defendants. So far as appears from the pleadings and proofs in this case, none of the complainants have any

interest in the subject matter of the bill.

Even if it were a fact that Lucian D. Young was dead when the bill was filed and had died intestate, leaving Mary I. Young, his widow, and the other complainants named as his children and only heirs at law, and these facts, had been alleged and proved the other facts in evidence are not so clear, satisfactory, and convincing as to justify the conclusion that the deed was intended to be a mortgage.

The decree of the Circuit Court, dismissing the bill for want of equity is affirmed.

2/a

GEN. NO. 6791. OCT. TERM, 1917. AG. NO. 26.

GEORGE E. CLARK, Plaintiff in Error,

vs

DIRECTORS OF SCHOOL DISTRICT NO. 38,

CASS COUNTY, ILLINOIS.

Defendants in Error.

Error to Circuit Court Cass County.

212 I.A. 638

ELDREDGE P. J.

Plaintiff in error was a school teacher and claims to have been employed by defendants in error to teach a school in School District No. 38 in Cass County, for $52.-50 per month for a period of six months. He was discharged after serving one month and ten days, as he claims unlawfully, and this action is brought to recover unpaid salary for the remaining five months. Defendants in error paid his salary for the first month, and after he was discharged tried to pay him for the ten extra days he served thereafter as teacher, but he refused to receive the amount tendered. The cause was heard by the court without a jury and judgment was rendered in favor of defendants in error. No question is raised that the court erred in not rendering judgment for the amount earned for ten days before his discharge, and is therefore waived.

The only material issue in the cause is whether the action of defendants in error in discharging plaintiff in error was justified by the facts and the law applicable thereto.

The school was situated in the country. Plaintiff in error was the only teacher, and there was no janitor. It was proved that it was the custom for teachers of the country schools in Cass County, where janitors were not provided, to act as such and keep the school room clean. One day a pupil was taken sick in school and vomited upon the floor. Plaintiff in error did not clean up the excreta but allowed it to remain on the floor in the school room where its appearance and noxious odor had a tendency to make some of the other children sick. After

this condition of things had continued for about two weeks, one of the school directors called upon plaintiff in error at the school house and requested him to remove the excreta from the room. Plaintiff in error became angry, assaulted and struck the director and chased him out of the school room. Plaintiff in error, subsequently, when arrested for assault and battery, pleaded guilty to the complaint, before a Justice of the Peace and was fined.

The Board of School Directors has the power "To dismiss a

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teacher for incompetency, cruelty, negligence, immorality or other sufficient cause." Chap. 122, Sec. 115, P. 3, Hurd's R. S. It was the duty of plaintiff in error who had complete and sole charge of the school room to either remove the excreta or cause it to be done, or at least call the attention of the directors to the matter so they could take steps to have it removed. A person who would allow such a condition to exist for such a length of time in a school room where children had to congregate each day for their studies, is not a fit person to be a public school teacher. The assault upon the director was unjustifiable and in keeping with the character of one who would be guilty of such a breach of duty to the health and comfort of the children under his charge as teacher. Under the facts in this case the school directors had sufficient cause to discharge plaintiff in error. The judgment of the Circuit Court is affirmed.

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302

GEN. NO. 6796. OCT TERM A. D. 1917. AG. NO. 29.

ORVIL F. HOPPER, Appellee,

212 I.A. 638

vs

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,

Appellant.

Appeal from Circuit Court Vermillion County.

ELDREDGE P. J.

In an action of trespass on the case, appellee recovered a judgment for $1,184.00 against appellant to reverse which this appeal is prosecuted.

The railway of appellant runs in an eastern and western direction at right angles across Walnut Street in the city of Danville. On the west side of Walnut Street and north of the right of way of appellant was the office building of the Frank Hill Lumber Yard. The west corner of said building was thirty-eight feet north from the center of the east bound track. This building has a front of about sixty-five feet on Walnut Street. The crossing is level with the grade on the street from a point. Between 35 and 40 feet north of the center of the east bound main track, the view westerly along the track is unobstructed for a distance of between 800 and 1700 feet. On October 31, 1916, at about eleven o'clock at night, appellant, accompanied by

his wife and another man and his wife, approached this crossing from the north. Appellant was driving the automobile at a very slow speed and when he was about thirty feet from the track, he saw a switch engine approaching the crossing from the west. He accelerated the speed and trusted that his speed would carry him over the tracks ahead of the approaching engine. The engine struck the automobile in about the center thereof and pushed it along the track for about 150 feet. The car was demolished and appellee suffered an injury of four broken ribs. There was much conflicting testimony as to whether the bell was ringing and as to the speed of the engine. The undis-

puted facts, however, are as above stated and also that the automobile was in good condition, under perfect control, and running very slow when appellee first saw the engine approaching. The facts further show that he had ample time in which to have stopped the automobile and prevent the accident but that through mistaken judgment he thought he could, by accelerating his speed pass over the crossing ahead of the approaching engine. In the case of Newell vs. C. C. & St. Louis Ry. Co. 261 Ill. 505, it was held, "Where a railroad train and a person traveling on the highway, each approaches a railroad crossing at the same time, it is not the duty of the company to stop its train, but it is the duty of the traveller, in obedience to the known custom of the country, to stop,

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and not attempt to pass in front of the advancing train."

It has been frequently held that to attempt to pass in front of an approaching train is such contributory negligence as will bar a recovery. Bale vs Chicago Junction Ry. Co. 259 Ill. 476; Deatrick vs L. E. & W. 164 Ill. Ap. 34; Stein vs C. &. E. I. RR. CO. 199 Ill. Ap. 48. In the case of Graham vs Hagmann 270 Ill. 252, it is said, "Railroads are engaged in the performance of a business of a **quasi** public nature and in carrying out the purposes for which they are created must necessarily often operate their trains at such a high rate of speed that they cannot be brought to a sudden stop without endangering the lives and safety of those riding therein. They travel on fixed tracks and cannot turn aside, and the danger to be encountered in entering thereon is so well known and is a matter of such common knowledge, that when a traveller on a public highway fails to use the ordinary precautions before driving thereon, the general knowledge and experience of mankind condemn such conduct as negligence." To the same effect are T. W. & W. Ry. Co. vs Jones 76 Ill. 311; C. B. & Q. R. R. Co. vs Damerell 81 Ill. 450.

But one conclusion can be drawn from the facts shown in this record and that is that the appellee was guilty of contributory negligence.

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Complaint is made of several instructions given on behalf of appellee and the exceptions thereto are well

taken, but in view of what we have said, it is unnecessary to comment thereon. The judgment is reversed, with the finding of fact that appellee was guilty of negligence which contributed to his injury, in attempting to pass over the crossing in front of the approaching engine in question.

3/a

GEN. NO. 6799. OCT. TERM A. D. 1917 AG. NO. 32

212 I.A. 638

JOSEPH SCHINGEL, JR., Appellant,

vs

M. S. PLAUT AND A. E. PLAUT, EXECUTORS OF THE LAST WILL AND TESTAMENT OF S. PLAUT, DECEASED.

Appellees.

Appeal from Circuit Court Vermillion County.

ELDREDGE P. J.

Appellant brought suit in assumpsit against appellees to recover a balance due upon a building contract. The declaration consists of the common counts and one ameded special court. A special demurrer was filed to the ameded special count and sustained thereto, whereupon appellant abided by this count and the court entered judgment against him in bar of the action.

At a subsequent term to that at which the judgment was entered, appellees filed an alleged bill of exceptions, which contained a conversation between the court and counsel for appellant had at the time of the argument of the demurrer, and an additional record has been filed in this court by appllees containing said bill of exceptions. No leave was asked for or granted in the trial court,, to file of exceptions or any time fixed therefor, at the term when the conversation took

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place. It was tendered and signed at a subsequent term to that at which the judgment was entered, without any order having been entered at that term granting time in which to file the same. The bill of exceptions has no validity and we can take no notice thereof and the additional record containing the same is striken from the files of this court.

The trial court had no power to enter a judgment in bar of the action on sustaining the demurrer to the amended special count when the common counts were still pending and undisposed of.

The special count sets out the contract in **haec verba** and alleges performance by appellant in all things in

regard thereto except as to the time provided for the completion of the building. It was provided in the contract that the work should be completed by August 10, 1916, but the work was not in fact completed until September 2, 1916. The contract also provided that if it should be completed before August 10, appellees agreed to pay to appellant $10.00 for each and every day that the building should be complete before that date in addition to the contract price; and by another provision it was agreed that should appellant fail to finish the work at the time agreed upon, he should pay to appellee as liquidated damages the sum of $10.00 for each day thereafter the work should remain incomplete, subject to the right of arbitration provided for in the contract. The contract

further provided that the time for the completion of the building could be extended only in case of general strike, alterations, fire or unusual action of the elements. It is alleged in the count by way of excuse for the failure of appellant to complete the contract within the time named that under the terms of the contract and the specifications, appellant was required to furnish a certain terra-cotta front for the building and that he awarded the contract for the same to the Midland Terra-Cotta Company on April 29, 1916; that on May 13, 1916, he received word from said company that it would be delayed in the filling of said contract because the employees of their factory went out on a strike; that immediately upon receipt of such information appellant went into the open market and endeavered to find some other company or concern to furnish the said contemplated terra-cotta front, but could not do so within the time fixed in the contract for the completion thereof; that said strike was a general strike within the meaning and contemplation of said contract.

The count further avers that the building was completed and appellees took possession thereof on September 2, 1916; that on September 9, 1916, appellees paid appellant on the contract $4,500.00 and on December 9, 1916, the further sum of $1,665.55, leaving a balance

of $300.00 due and unpaid. The special cause of the demurrer to the count is that no facts are averred therein tending to show that the strike mentioned was a general strike within the meaning of the contract. The position of appellant is that the facts alleged are sufficient to show that the delay was caused by a general strike, and also that the averments that appellees accepted the building and took possession thereof without protest and thereafter paid two instalments on the contract price, show a waiver by them of the performance of the contract by the day fixed. Appellees could waive the performance on the day fixed but would not thereby waive their right to recoup such damages they might have sustained by reason of the delay. Snell vs. Cottingham, 72 Ill. 161. Nor does an owner waive his damages by the partial payment of the contract to the builder after the time fixed for completion 9 C. J. 792.

As a general rule a contractor cannot urge as an excuse for failure to perform the contract in time that a sub-contractor failed to perform his contract, (9 C. J. 786) and this is true even where the sub-contractor is delayed on account of a strike among his servants. Nevlett vs McGraw 47 Tex. Civ. A. 103 S. W. 1113. A "general" strike in a building contract, such as in the one in this case, undoubtedly means something more than a strike by the employees of one of the

sub-contractors. Weber vs Collins 139 Mo. 501, 41 S. W. 249.

But this count, notwithstanding what has been said, sets out a good cause of action. There is nothing in the contract which provides that appellant should not be paid the contract price if he should not complete the building within the time named. While it is true that under the contract appellant might have been entitled to have received a reward if he had completed the building before the day named and may have to pay certain liquidated damages for not doing so, yet these are only incidental matters to be adjudicated on the final accounting, and the fact that appellees may, if the evidence

should so warrant, recoup their damages by reason of the delay, does not destroy appellant's right to recover whatever balance may be due on the contract price after such recoupment. The right of recoupment is a matter of defense and need not be negatived in the declaration. The count would have been good without any averments therein in regard to excuses for the delay in the construction of the building and these averments may be treated as mere surplusage.

The judgment is reversed and the cause remanded with directions to overrule the demurrer.

32a

GEN. NO. 6810. OCT. TERM A. D. 1917. AG. NO. 41.

DOLLIE SMITH, Appellee,

vs.

212 I.A. 638

PETER JACOBS, et al. Trustees of the Firemen's Pension Fund of the City of Springfield, Illinois, Appellants.

Appeal from Circuit Court Sangamon County.

ELDREDGE P. J.

Appellee filed her petition in the Circuit Court of Sangamon County for a writ of mandamus against the Board of Trustees of the Firemen's Penison Fund of the City of Springfield, commanding them to grant her a pension out of said fund on account of the death of her husband, Mark C. Smith. It is averred in the petition that her husband in his lifetime, as fireman, was compelled while on duty to stay in the engine house during the daytime and to sleep there at night in quarters provided for that purpose; that while so on duty and while living in said engine house, by reason of his occupation he contracted typhoid fever, which, ultimately and of itself and through other diseases resulting therefrom, terminated his life; that said engine house had become unhealthy and had therein the germs which gave him said typhoid fever. The cause was tried before a jury which found that Mark C. Smith while in the service of the Springfield Fire Department died as a re-

sult of typhoid fever, contracted by reason of his occupation. The only question involved was one of fact as to whether the deceased died of typhoid fever or pneumonia, contracted by reason of his occupation. The evidence tended to show that another fireman was sick in the engine house with typhoid fever at the time that the deceased was taken sick with the same disease and that he was taken to his home and from there to a hospital, where he died within a few days. At the time of his death, he was also suffering from pneumonia. The evidence tended to show that pneumonia frequently developes as a result of typhoid fever. The petition is broad enough to

admit proof of both diseases and it was a question of fact under all the evidence whether the pneumonia was a result of the typhoid fever or of catching cold, and if it was the result of the cold, whether it was the sole cause of his death. The verdict of the jury is sustained by the evidence and the judgment is affirmed.

33a

GEN NO. 6816. OCT. TERM A. D. 1917. AG. NO. 47.

FRED W. POTTER, INSURANCE SUPERINTENDENT OF THE STATE OF ILLINOIS

vs

NORTHERN LIFE INSURANCE COMPANY

212 I.A. 639

FEDERAL LIFE INSURANCE COMPANY, Appellant,

vs

SANGAMON LOAN & TRUST COMPANY, RECEIVER

Appellee

Appeal from Circuit Court Sangamon County

ELDREDGE P. J.

Fred W. Potter, Insurance Superintendent of the State of Illinois, filed a bill for the purpose of having a receiver appointed for the Northern Life Insurance Company. Upon a hearing in that cause the Sanagamon Loan and Trust Company was appointed receiver. Subsequently, by order of the court and with the approval of the Insurance Superintendent, the Sangamon Loan and Trust Company, as receiver, made a contract with the Federal Life Insurance Company for reinsurances of the policies held in the Northern Life Insurance Company. Thereafter the Federal Life Insurance Company filed an intervening petition in the cause to compel the receiver to make good certain certificates of deposit, which under the contract had been transferred to the Federal

Life Insurance Company. The receiver answered the petition and filed a cross bill to obtain a construction of a certain provision in its contract with the Federal Life Insurance Company. It appears that certain policies issued by the Federal Life Insurance Company contained what are designated as, "Automatic Extended Insurance" and "Automatic Loans" features under which the insured had the option of taking the cash surrender value of the policy or of borrowing the loan value, and if he did neither and failed to pay his

premiums, said values were automatically applied to the payment of the premiums and the policy was thereby automatically extended.

The first paragraph in the contract after the preamble therein, provides for the assumption of all liabilities by Federal Life Insurance Company of the policy contracts of the Northern Life Insurance Company. The second paragraph provides that the Federal Life Insurance Company shall deposit with the Insurance Superintendent a certain sum to replace the impairment in the deposit of the Northern Life Insurance Company. The third paragraph is the one in controversy and is as follows:

"The Company agrees that after the sum mentioned in the foregoing paragraph has been paid to the Insurance Department of the State of Illinois it will pay to the receiver additional sums which will, to-

gether with the sum to be paid to said deposit fund aforesaid, aggregate $10.00 on each $1,000 of outstanding insurance upon which a full annual renewal premium shall be paid to the company, and a **pro rata** proportion of said sum of $10.00 per $1,000 of insurance upon any quarterly or semi-annual premiums paid to said Company."

There is but one question involved on this appeal and that is whether appellant should account to the receiver by virtue of the above provision in the contract, on those policies automatically extended as above mentioned. The question is presented by the receiver in its cross bill as follows:

"Your Petitioner does not know but herein presents to the Court for determination, the question of whether or not, under said contract, your Petitioner is entitled to receive the sum of $10.00 for each thousand of such insurance so automatically extended and renewed."

The Chancellor held that the Federal Life Insurance Company should so account. There is nothing ambiguous in the language of the third paragraph above quoted. There is no reference therein to policies automatically extended by the application of the surrender and loan values to the payment of premiums. It provides that $10.00 on each $1,000.00 of out standing insurance upon

which a full annual

Page 3

renewal premium shall be paid to the company, and a **pro rata** proportion of said $10.00 per $1,000.00 of insurance upon quarterly or semi-annually renewal premium paid to the company, shall be paid to the receiver, and there is nothing in the words used to indicate an intention that this provision should apply to any premiums that had already been paid under the policy when the contract was made with the receiver, but the words used show a clear intention that this provision of the contract should apply only to the renewal premiums paid in the future. That such was clearly the intent of the contracting parties when the contract was made is shown by their own construction thereof. Under the fourth paragraph of the contract the Federal Life Insurance Company agreed to make a monthly report of all payments made to it for renewal premiums received during the previous month, and to remit to the receiver with each monthly statement the amount due the receiver on account thereof. The fifth paragraph provides that the receiver shall at all reasonable times have access to the books of the company for the purpose of verifying such monthly statements. The Insurance Company made these monthly reports and statements for two years before the receiver expressed any doubt in regard to the meaning of said provision of the contract.

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The decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree in conformity with this opinion.

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GEN. NO. 6819. OCT. TERM A. D. 1917. AG. NO. 50.

W. B. OTTO, and EDMUND AXFORD,

PARTNERS, ETC. Appellees.

vs.

212 I.A. 639

GEORGE PURCELL, Appellant.

Appeal from Circuit Court McLean County.

ELDREDGE P. J.

Appellees recovered a judgment for $500.00 damages in a suit in assumpsit for alleged breaches of certain warranties growing out of a sale by appellant to them of two stallions. The purchase price thereof was $900.00. One of the stallions warranted to be sound was subsequently discovered to be a "cribber." The other stallion was warranted to be elligible to registration in the Percheron Stud Book published by the Percheron Society of America. The evidence on the questions of the respective warranties was more or less conflicting but whether there were such warranties and whether there were breaches thereof were questions of fact for the jury to determine and the evidence fully sustains the verdict in regard thereto.

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The fourth and eleventh instructions given on behalf of appellee are complained of as being argumentative. They state correct propositions of law and seek to apply the law to the facts in the case, and, while they are somewhat lengthy anl involved, they are not subject to the criticism made. The twelfth instruction given on behalf of appellee is criticized on the ground that it assumes that one of the stallions was afflicted with disease. Such a construction cannot be reasonably placed thereon for the reason that it is stated therein "and if you further believe from the evidence that Hidalgo, at the time of such negotiations, was unsound, within the definition given in this instruction, your verdict should be for the plaintiff, etc."

It is also contended that the court erred in refusing several instructions offered on behalf of appellant. The court gave twenty instructions for appellant which covered every phase of the matter in controversy. The

principle of law involved in refused instruction "A" is contained in given instruction "O." The elements of refused instruction "E" are contained in several other instruction given and the same may be said of refused instructions "G", "K", and "N."

Complaint is also made that the couort permitted certan witnesses to tesitify that in the community where the sale was made,

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"cribbing" was regarded as an unsoundness as it rendered an animal addicted to it less salable. The court subsequently excluded all this testimony and directed the jury to disregard it. It is claimed however that the exclusion thereof did not cure the damages done by its admission. The admission and exclusion of this testimony was harmless error, for the reason that there is ample competent proof to sustain the theory that "cribbing" is the result of a disorder of the stomach, resulting in a falling off of flesh, indigeston, colic, and may result in death.

There is no substantial error in the record and the judgment will be affirmed.

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GEN. NO. 6827. OCT TERM A. D. 1917. AG. NO. 80.

DELIA L. STADLER, Paintiff in Error,

212 I.A. 639

vs

ESTATE OF JOHN STADLER, Defendant in Error

Error to Circuit Court Macoupin County.

ELDREDGE P. J.

John Stadler died testate August 4, 1914, leaving plaintiff in error, his widow, and five children by a former wife. Plaintiff in error and her step-son, Elmer E. Stadler, were made co-executors of the estate of the deceased by the terms of the will. After disposing of the furniture and household utensils in the dwelling house, the will directs the executors to sell all the remainder of the personal property and also the real estate and convert the same into cash. Out of the sum thus realized, the will directs that the debts shall be first paid, and from the balance plaintiff in error shall receive one third and that the remaining two thirds shall be equally divided among the five children. The will was probated on September 25, 1914, and both of said executors qualified and are now acting as such. On September 25, 1914, plaintiff in error, after consultation with her attorneys, voluntarily and without consideration filed the following waiver in said estate:

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"Whereas, John Stadler, late of the County of Macoupin, in the State of Illinois, in and by his last will and testament proven in the County Court of said county, made the following provision for the undersigned, to-wit: One-third part of said estate when reduced to money, both as to the real and personal property.

"I, Delia L. Stadler, widow of the said John Stadler, deceased, do hereby accept the provisions of said will so far as my interest in said estate is concerned, being one-third part of said estate when all reduced to money, and waive all my rights as to homestead, dower and widow's award in consideration of said provision in said will in my behalf."

Thereafter the executors jointly proceeded in the administration of the estate until May 23, 1916, when

plaintiff in error filed a petition therein representing that appraisers in their bill of appraisement and failed and neglected to set off and fix her widow's award and prays that they may be directed to do so. The County Court allowed the prayer of the petition and directed the appraisers to fix her award. From this order an appeal was taken to the Circuit Court by her co-executors, Elmer E. Stadler. Upon a hearing in the Circuit Court that court found that plaintiff in error, by her written renunciation and waiver and by her acts and doings in connection

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therewith, has fully and effectually given, remised and released unto the said estate her widow's award, and has estopped herself from claiming the same, and the order of the County Court was reversed.

It is apparent from the evidence that plaintiff in error under a mistaken apprehension of the law thought that in order to take under the will it was necessary to formally waive her rights to her widow's award, homestead and dower. It is conceded that if she took under the will, it would be in lieu of her dower and that her homestead could not be waived in the manner adopted and that the only question involved on this appeal is the effect of said waiver upon her right to her widow's award. The evidence shows that the waiver was executed volunatrily without consideration, that no rights of any creditors, legatees, or third persons would be prejudiced by the allowance of the award and that there are ample funds in the estate with which to pay it. While the general rule is, in law as well as in equity, that a person will not be relieved of his obligations entered into through a mistake of law, yet there are some exceptions to this rule. The administration of estates is an equitible proceeding. Mistakes of private rights of property created by law have frequently been considered as mistakes of matters of fact, and where one acknowledges himself under an obligation which the law does not impose on him, he will be relieved

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therefrom in equity if it can be done without prejudice to others. 13 C. J. 379, et seq. There was no obligation on the part of plaintiff in error

to waive her widow's award and it was done under the belief that the law required her to do so, in order for her to take under the will. None of her acts, as a co-executor of the will in the administration of the estate, can result to the prejudice of any one if the award should be allowed, nor should they estop her from having that which is rightfully and legally hers. The estate has not been settled and there has been no final distribution therein, and, under the circumstances shown, plaintiff in error should not be estopped from rescinding the waiver and from receiving her widow's award.

The judgment of the Circuit Court is reversed and the cause remanded.

36a

GEN. NO. 6832. OCT TERM A. D. 1917. AG. NO. 59.

E. L. LANDGRAFF, Appellant,

vs

212 I.A. 639

FRED A. WILLIAMS, Appellee.

Appeal from Circuit Court DeWitt County.

ELDREDGE P. J.

Appellant and appellee entered into a co-partnership for the purpose of threating diseases at Decatur, Illinois, by a system known as chiropractic, which consists in manipulating the spine and muscles. They subsequently opened a branch office in the city of Clinton, appellant taking sole charge of the office at Decatur, and appellee sole charge of the Clinton office. On April 3, 1914, appellant filed a bill for an accounting and dissolution of partnership. Appellee answered the bill and filed a cross bill to which appellant filed an answer. The Master in Chancery, who heard the proofs, reported that the contract of co-partnership between the parties was of such doubtful propriety that equity would not assume to grant the dissolution of partnership prayed for in either the original or cross bill and recommended that the bill and cross bill be dismissed for want of equity. The master's report was approved and the cross bill and

original bill were dismissed for want of equity. Appellee had a license from the State Board of Health to practlic. It is a well settled principal that courts will not asthat appellant did not have a license to pratice his profession and the partnership was a fraud upon the public. It is awell settled principle that courts will not assist either party as between themselves in transactions tainted with fraud or contrary to public policy. Black vs Warner 278 Ill. 368; Smythe vs Evans 290 Ill. 376; Jerome vs Bigelow 666 Ill. 452; Craft vs McConoughy 79 Ill. 346.

The decree of the Circuit Court is affirmed.

37a

GEN. NO. 6835. OCT TERM A. D. 1917. AG. NO. 62.

ELLINER WEBSTER, Appellee,

vs

L. E. SHAFER, Appellant.

212 I.A. 639

Appeal from Circuit Court Champaign County

ELDREDGE P. J.

On the 11th day of June, 1915, in vacation during the adjournment of the April term of the Circuit Court of Champaign County, a judgment was entered by confession for the sum of $7,700.00 and costs in favor of Elliner Webster, appellee, and against L. E. Shafer, appellant, on a promissory note and power of attorney to confess judgment. The power of attorney also provides for $700.00 attorney's fees if the note be placed with an officer or other person for collection. The note is dated February 28, 1914, and purports to have been executed by G. O. Shafer and L. E. Shafer. It is payable on or before six months after date and on the back thereof is the following endorsement:

"This note is given as security for an undivided Seventwenty- fifths (7-25) part of a lot and three story brick apartment house, consisting of 24 apartments to be constructed on said lot after the plans that have been agreed upon, during the year 1914, and to which property a warranty deed will be given clear of all incumbrance, except a mort-

gage for $20,000.00 to be placed on the property when completed. Said building to be constructed on lot eight (8), block twenty (20), Fairland Place Addition, or some other lot that may be mutually decided upon for the same purpose."

On the same day that judgment was rendered, an execution was issued thereon, which was returned by the sheriff unsatisfied on September 24, 1915. On March 1, 1917, an alias execution was issued which was levied by the sheriff on April 27, 1917, upon certain real estate owned by appellant. On May 21, 1917, appellant made a motion in vacation during the April Term, 1917, before one of the Judges of said court to enter an order

staying the execution until the further order of the court and that the sale there under be postponed until the April Term, 1917, in order that she might present her motion to the court at that time to set aside the judgment and for leave to plead. The court granted the motion and ordered the execution and all proceedings in said cause be stayed until the further order of the court. On May 26, 1917, being one of the regular days of the April term, appellant made a motion to vacate the judgment and for leave to plead. Appellant, in support of her motion, filed two affidavits, the substance of which is, that her name is Lettie E. Shafer and is the person designated as L. E. Shafer; that she is the widow of George O. Shafer, deceased, he

being the same as the G. O. Shafer mentioned in the note and judgment; that she is not indebted to appellee, and was not on the date of the judgment, indebted to appellee in the sum of $7,000.00 nor in any other amount; that she never at any time signed any note payable to appellee for said sum or any like sum either with the said G. O. Shafer or alone, and that said note is not the note of affiant and she did not know it was in existence until long after the death of said G. O. Shafer, her husband, and long after the said judgment had been confessed; that George O. Shafer died June 9. 1915, and that the judgment was confessed on the second day after the death of her husband; that the body of the note is in the hand writing of appellee, who, on the day the note bears date and from that time until the death of said George O. Shafer, was his confidential secretary; that several weeks before the date of the note, interest to the amount of $1,400.00 became due upon a certain mortgage covering property belonging to affiant; that said George O. Shafer signed a note in blank as G. O. Shafer and that in signing it he got too much ink on his pen thereby causing his initials to blur and affiant recognizes said signature on said blank note as the signature "G. O. Shafer" which appears on the note filed in this cause; that at the time the said George O. Shafer signed the blank note he presented it without any name of payee, without a date and

without any amount of principal being written therein, also without any provision for any attorney's fees therein, and without any provision as to when the same should be payable, in fact, with only just the printed portion of said note and without any writing thereon whatever except the signature "G. O. Shafer", and stated to affiant that he wanted to use the note for raising $1,400 to pay the interest which was due on her building and that he would fill it in for the amount of said interest and repuested affiant to sign it in blank, but affiant objected to signing the note in that form and he stated that he would fill in the amount of the said interest and that it would be executed for that amount only, whereupon affiant signed her name to the blank note; that she never authorized appellee or said George O. Shafer or any other person to fill in the blanks over her said signature for any other sum than for $1,400 or the amount of interest then due upon her premises known as the Orlando apartments in Urbana, Illinois; that she never authorized appellee nor her husband to insert therein any provision for $700 for an attorney's fees, nor for a principal amount of $7,000.00; that said appellee, herself, filled in the blanks of said note without any authority from affiant and with full knowledge that said note had been signed in blank and without inquiring from affiant as to the purpose for which the same had been signed; that the affi-

davit, attached to said narr and cognovit signed by appellee, in which the latter states that she saw affiant sign her name to said note, is absolutely and unqualifiedly false and was made with knowledge of its falsity; that affiant is a woman unfamiliar with business affairs; that her husband had died and was buried on the day the judgment was rendered and that she had been wholly dependant upon him to attend to and advise her in regard to business affairs; that she knew nothing about the effect of judgments either by confession or otherwise; that it was long after said judgments was rendered before she learned of the same and when she did learn thereof, she did not know that the effect thereof was that it would be enforced against her property and not

against the property of her husband; that she understood said note was signed by her husband and knew it was not for any debt of hers and from this presumed that said judgment would have to be paid out of her husband's estate, and as soon as an executor was appointed the matter would be adjusted by him; that her husband left a will which had been executed by him in the Republic of Mexico, according to the law in that Republic, while he resided there and that immediately upon his death, affiant applied to have said will probated and be appointed as executrix thereof and that for two years said application for the

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probate of said will has been pending, but because of the existence of unsettled war conditions in Mexico, she was informed by her attorney that he was unable to procure the depositions of the witnesses to said will, and in such condition the matter has been continued from term to term until the present time; that all her husband's property has been placed in the hands of a receiver; that the attorney for appellant led her to believe that he expected to collect the said judgment from her husband's estate and was continually inquiring of her when the will was to be probated and urging the probating of said will; that no execution has ever been served on her and no effort has been made to sell her property until within the last six weeks, and that owing to these facts she was kept in ignorance of the effect of said judgment against her and did not know that the same made her seperately and individually responsible for the said alleged debt of her husband; that she does not know whether her husband in fact owed the said note, other than the mere fact that he did sign the note in blank at the same time that she signed it; that appellee has in no way been inqured by said delay; that no part of the property of her husband's estate has been lost and affiant has not conveyed away any of her property during the intervening period since the confession of the judgment; that appellant has never at any time come to this affiant with regard to the said note or judgment nor

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made any demand

upon her for the payment thereof, and that the only demands made by her atorney have been that affiant proceed with more diligence in the matter of getting the will of her husband probated; that he had asked that said note be settled but affiant has at all times understood that he was demanding that the note be settled out of her husband's estate, for the reason, that at all times the attorney for appellee complained about the delay in the matter of appointment of the executor, and that he never at any time expressly requested affiant to pay said note out of her own funds and she never at any time understood that he expected her to do so, nor did she understand that he had a right to compel her to do so until she noticed in the papepr the advertisement for the sale of her property.

Counter affidavits were filed by appellee and her attorney and one other person, tending to show that appellant had recognized the judgment as a debt of her own and had knowledge of her liability thereon since a short time after the judgment was rendered. The purpose of the affidavits was to show that appellant was now estopped by laches from maintaining her motion.

There is no definate limitation of time for exercising the equitable power of the court to open up a judgment and permit a defen-

dant to plead to the merits. Burwell vs Orr 84 Ill. 465; Wyman vs. Yeomans 84 Ill. 403; Austin vs. Lott, 28 Ill. 519. Courts of law exercise an equitable jurisdiction of judgments entered by confession upon notes with powers of attorney and should exercise it liberally in all proper cases. Hall vs Jones 32 Ill. 38. While a court will refuse to grant such a motion where the record shows an unreasonable delay or lack of diligence on the part of the defendant in presenting it, yet the question of laches on the part of the defendant must be determined from the facts in each particular case. The same strictness as to the time when a motion should be made to open up or vacate a judgment taken by default in a case where the defendant has been served with summons has neglected or refused to appear and defend, does not obtain as to such a motion directed to a judgment entered by confession

and especially when it is entered in vacation.

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From an equitable point of view, which the court must take of the facts bearing upon the diligence of appellant in presenting her motion to have the judgment opened up and for leave to plead to the merits of the case, we think she should not be deemed guilty of such laches as would bar her from defending upon the merits. The judgment was entered in vacation on the day her husband was buried. She knew that she had never signed any note payable to appellee or anybody else for the sum of $7,000.00. She did not know there was any personal liability against her on account of said judgment. She was led to believe by the words and actions of appellee and her attorneys that it was a judgment against her husband for some indebtedness of his. He had made a will while residing in Mexico and owing to the insurrection in that country she had been unable to have it probated because she could not get the depositions of the witnesses thereto. All the property of her husband had been placed in the hands of a receiver. Neither of the executions had been served upon her. Appellee and her attorney had frequently importuned her to hasten the probating of her

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husband's will so that the judgment could be filed as a claim against his estate. As soon as she saw the advertisement of her property for sale, she sought legal advice and took the necessary steps to preserve her rights. No harm can be done appellee by the granting of the motion as the judgment can stand as security for the debt, and the suspicious circumstances surrounding the whole transaction demand that in good conscience a trial should be had upon the merits.

The judgment of the Circuit Court is reversed and the cause remanded with directions to open up the judgment and grant leave to appellant to plead to the declaration; the judgment to stand as security for the debt.

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GEN. NO. 6840. OCT. TERM A. D. 1917. AG. NO. 65.

ROBERT A. BOWER, JR., Executor of the Estate of John Thrash, deceased. Appellant.

vs 212 I.A. 640

PERRY THRASH, Appellee.

Appeal from Circuit Court Champaign County.

ELDREDGE P. J.

This is an appeal from a judgment rendered in favor of appellee in an action of trover, originally begun by the conservator of John Thrash, a feeble minded person, to recover the value of a promissory note for the principal sum of $2,000.00 with interest at five per cent per annum, dated April 11, 1908, executed by Perry Thrash, appellee, and payable to the order of John Thrash. During the trial, the conservator died and appellant, as executor of the last will and testament of John Thrash, deceased, was substituted as party plaintiff. The cause was heard before the court without a jury.

On May 9, 1916, John Thrash was taken sick w pneumonia and at this time and for several years prior thereto he had also been afflicted with prostatitis. He had a high fever and was very sick. There is no evidence that anybody lived with him. He was an old man about eighty years of age. The pneumonie lasted about ten days, during

much of which time he was irrational. Dr. C. A. Mallory attended him on May 9 and at that time he was lying in bed in a very debilitated condition. He had on his overalls, coat, vest, shoes, stockings and a big stocking cap drawn over his head. On May 10 J. P. Crawford, a male nurse, was procured to take care of him. He found him in a filthy condition and with numerous bed sores. It was several days before the nurse could persuade him to remove his clothing. The pneumonia lasted about ten days during which time he was visited by Dr. Mallory every day. John Thrash was the father of appellee. On May 11 appellee came to the home of his father and told Crawford the nurse that his father wanted to give him a book and asked if his father

had said anything to him about it. Appellee also asked his father if he wanted to give him the book but the latter made no reply. A day or two thereafter appellee again came to the house and again asked his father if he wanted to give him the book. His father told him to get the key out of his pocket book and open the trunk, which appellee did and took from the trunk a small brown backed book and held it up to his father who said that that was the book. His father then told him to take the book to the bank and that Allen Bowers would put it in his box there with his papers and that he and Allen would have to look after his business. Mr. Allen Bowers was cashier of the Bank of Tolono. John Thrash also told appellee that

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the book contained a list of his business accounts. Either on that day or shortly thereafter appellee went to the bank and told Bowers that his father had given him "that $2,000.00 note and also that his father wanted him to look after his business, loan his money, pay his bills, see that he was properly taken care of, employ a nurse if he should require it, get a doctor, and take care of his business matters, and that his father said to him, "I want you to take that $2,000.00 note." Bowers told appellee that he had better go back and have his father say something about this gift before witnesses, as the transaction might be questioned and appellee replied that he couldn't do that because he didn't want anybody to know about it as it might start some trouble. Bowers then requested him to take the note and have his father endorse it on the back as satisfied and sign his name to it. Appellee replied that he did not like to bother about it; that it is all right, it is nobody's business but his father's and his own, and that he was not going to bother about it any more. On May 15, appellee again appeared at the bank and told Bowers that he wanted his father's papers. Bowers thereupon gave him the box which contained the papers. Appellee opened the box and took out the notes belonging to his father and said to Bowers, "I am going to take this $2.000.00 note because my

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father has given it to

me and I want to leave something to show why I took the note." Thereupon Bowers drew up the following receipt which appellee signed:

"Tolono, Ill., May 15, 1916.

$2,000.00

I have received of the Bank of Tolono a note signed by myself payable to John Thrash, dated April 11,1908—I have taken this note at request of my father who desired that I should have it."

PERRY THRASH."

When the conservator made the demand upon appellee for this note, the latter stated that he had taken the note and destroyed it and that he would not replace it unless the court required him to. Crawford, the nurse, was absent from John Thrash's home between August 25 and 28 and his place for those three days was taken by the witness Telford, who resided in Tolono in a house next to that of appellee. Telford testifies that while he was acting as nurse for John Thrash in Crawford's place in August, he had the following conversation with him: "He says, 'I have accumulated quite a little property here,' and I says, 'Yes, sir,' I says, 'you gave your son a pretty good present in the spring.' I says, 'He told me you gave him a two thousand dollar note,' and he says 'Yes, I did.' He says, 'He has done more for me, stuck to me when the

other children didn't and I feel like doing more for him than I have done.'" This was all the evidence introduced to sustain the theory that the note was the gift to appellee from his father. John Thrash died in April, 1917, and the third clause of his will, which was executed October 31. 1906 and more than eighteen months prior to the execution of the note, is as follows: "I have already given my two sons, Perry Thrash and William Thrash, all that I wish them or either of them to have of my estate." The only conflict in the evidence is as to the mental condition of John Thrash in May, 1916, when it was claimed that he gave the note to appellee as a gift, and in August of that year when the alleged conversation was had between Telford and John Thrash. Dr. Mallory and Crawford the nurse, each of whom attended him constantly until

his death, testified that in their judgments, during that period of time, he did not have sufficient mental capacity to understand and transact his ordinary business affairs. Dr. R. S. Jesse was called to treat him also in July and testifies that at that time he had not sufficient mental capacity to understand and transact ordinary business affairs. Both these physicians state that he was suffering from senility; that the prostatitis from which he had suffered so long had caused an inflammation of the bladder, which resulted at times in pain and had produced a poisonous condition to his system and also a weak heart.

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There is no evidence to contradict his physician condition, but five witnesses, who had been acquainted with him, testified that in their judgments from causual meetings with him, he had sufficient mental capacity to transact his ordinary business affairs, though one of these witnesses admitted that when he met him on the occasion mentioned, he did not know the witness's name nor remember that he had ever seen him before although he had been acquainted with him for over ten years. It is however unnecessary to determine whether John Thrash had mental capacity sufficient to understand his ordinary business affairs or not as the case may be determined on the question whether there was a valid gift of the note irrespective of the mental condition of the donor. Leaving out of consideration the mental condition of John Thrash at the time when the gift of the note is alleged to have been made, there is no conflict in the evidence. The case was tried before the court who saw and heard the witnesses and finding upon the facts, if the evidence had been conflicting, would not be disturbed by this court unless clearly contrary to the manifest weight of the evidence, but the record before us presents only the question of law whether the facts proven are sufficient to establish a gift of the note in question,

The evidence clearly shows that appellee became possessed of the note by virtue of the request of his father to take possesion of

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his papers and take care of his business in conjunction with Allen Bowers, the cashier of the bank, while he was sick. This agency or trust established a fiduciary relation between the parties in addition to that of father and son. This fiduciary relation having been established, the burden was upon appelle to clearly prove all the elements essential to a valid gift. Morgan vs Owens, 228 Ill. 598; Dwyer vs O'Conor, 200 Ill. 52. At the time appellee took possession of this note the evidence conclusively shows that his father was very seriously ill with pneumonia and very feeble in mind and body. He was eighty years of age, had been troubled for years with prostatitis, which at times produced severe pains and was in fact in a state of senility. In the case of Hensen vs Cooksey, 237 Ill. 620, the circumstances surrounding the parties were very similar to those shown by the evidence in this case, and the court there said, "The relation between appellant and appellee was of a fiduciary character. While the evidence does not show a want of mental capacity on the part of Mrs. Hensan, it does show that she had recently been quite ill. She was old and feeble. Her physical condition was very much reduced, and on the day she executed the deed she was so nerveous, weak and exhausted that she could not have been capable of serious mental effort. Her son had managed her business affairs when they required attention. She

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relied upon him when complications arose in connection with them, and she believed that his efforts had saved her property for her. He had himself proposed returning to the farm, to fix it up and live there. She had leased it to him upon a consideration to be afterward determined. Their relation was one of confidence reposed by her and is in consistent with the idea that they were dealing at arm's length. A fiduciary relation exists in every case 'in which there in confidence reposed on one side and the resulting superiority and influence on the other. The relation and the duties involved in it need not be legal; it may be moral, social, domestic or merely personal.' Irwin v. Sample, 213 Ill. 160; Walker v. Shepard, 210 id. 100; Roby v. Colehour, 135 id, 300."

The burden of proof was upon appellee to satisfy the court that he dealt at arm's length with his father and that there was in fact a **bono fida** gift of the note to him. Three facts are relied upon by counsel for appellee as establishing the gift—the possession of the note by appellee, the statement of appellee to Bowers that his father had given him the note, and the alleged admission of the father to Telford that he had given the note to appellee. The possession of the note by appellee procured by a generay authority to take possession of all the papers of his father for the purpose of transacting the latter's business while he was sick, cannot be considered as evidence of owner-

ship of the note. While the declarations of a donee in possession are admissible to show claim of ownership, (Martin vs Martin 174 Ill. 371), yet they are not in themselves sufficient evidence to establish the substantive fact of the gift. And the same is true of the alleged declarations and admissions of the supposed donor. Campbell vs Sech, 155 Mich. 634; Merchant's Loan & Trust Co. vs Egan 143 Ill. Ap. 572;Fouts vs Mance, L. R. A. 1916 E. p 283; 20 Cyc 1222, 1223, 1225, 1226. The proofs fail to satisfactorily show as a matter of law that the note in question was a valid gift to appellee by his father. The judgment of the trial court is reversed and judgment is entered in this court in favor of appellant and against appellee for the sum of $2,325.00 and costs, which judgment includes interest at five per cent from April 11, 1915.

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GEN. NO. 6843. APRIL TERM A. D. 1918. AG. NO. 4.

ROSIE RUCKMAN, Appellee.

vs

W. C. RUCKMAN, Appellant.

212 I.A. 640

Appeal from Circuit Court Piatt County.

ELDREDGE P. J.

Appellee brought suit against appellant, her husband, for seperate maintenance and support. Upon a hearing, the court rendered a decree in favor of appellee and ordered appellant to pay $500.00 solicitor's fees and to pay appellee $125.00 per month for her support. The appeal is only from that part of the decree ordering the payment of said sum for her maintenance and support, claiming that the amount fixed to be excessive.

The evidence shows that the couple were married December 31, 1894, and lived on a farm near Mansfield in Piatt County for a number of years when they removed to the village of Mansfield, where they lived until the fore part of 1916. Seven children were born of said marriage, the oldest one at the time the bill was filed being twenty years of age and the youngest four years of age. Six of these children reside with appellee. In 1913, appellant began associating

with other women and particularly with one by the name of Mae Atteberry. In 1916 he pursuaded his wife to move to the city of Champaign for the purpose of educating the children and she purchased a home there with her own money. He remained in the village of Mansfield where he had a hardware and implement business. At this time he owned 205 acres of land in Piatt County, Illinois, 172 acres near Chillicothe, Missouri, and 160 acres in Texas. Shortly after he had located his family in Champaign, he sold his hardware store and implement business and lived with Mae Atteberry for a time in Bloomington, Illinois, when they went and lived together on his farm near Chillicothe, Missouri, and subsequently moved from the farm to the town of Chillicothe where they are now living together. The evidence shows that

appellant's equity in the real estate mentioned amounts to about $50,000.00 and that his total earning capacity from all sources including the income from the land mentioned, was over $4,000.00. It is conceded that his conduct has been most reprehensible, and in a letter to his wife, he threatened to spend all the money that he had in litigation to prevent her and his children from having "a cent to live on." By a juggling of figures it is sought to show that his income is not sufficient to pay the amount decreed against him. The evidence shows that if he

would avoid the expense of his paramour and pay attention to his farms and business, he would have ample funds with which to pay the amount decreed for the support of his wife.

The decree of the Circuit Court is affirmed.

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GEN. NO. 6844. OCT. TERM A. D. 1917 AG. NO. 68.

WILLIAM GARRIS AND ROBERT L. LEGGETT,

Appellees,

212 I.A. 640

vs.

SCHOOL DIRECTORS OF SCHOOL DISTRICT NO. 5, COUNTY OF DEWITT AND STATE OF ILLINOIS.

Appellants

Appeal from Circuit Court DeWitt County.

ELDREDGE P. J.

Appellees, who resided in School District No. 5 in the Country of De Witt and were property owners and tax payers therein, filed their bill of complaint in the Circuit Court of said county, praying that appellants, as school directors of said district, be enjoined from building a one story school building in said district and from issuing bonds in the sum of $1,800.00 for such purpose on the ground that there had been no valid election on the proposition of issuing the bonds. Upon a hearing Chancellor entered a decree permanently enjoining appellants from isuing the bonds.

Many reasons are presented by appellees to sustain their contention that no legal election was authorized or held on the question of whether the bonds should be issued, but it is necessary to consider but one of them. The ninth paragraph of Section 114 of

Chapter 122 R. S. provides that one of the duties of the Board of Directors is to establish and keep in operation for at least six months in each year a sufficient number of free schools for the accommodation of all persons in the district between the ages of six and twenty-one years. Section 119 provides that it shall not be lawful for a Board of Directors to build a school house without a vote of the people at an election called and conducted as required by Sec. 198 of the Act. Sec. 195 authorizes the directors to borrow money and issue bonds for the purpose of building a school house when authorized by a majority of the votes cast at an

election held for that purpose. Section 198 is as follows: "When it is desired to hold an election for the purpose of borrowing money, the directors of the district shall give at least ten days notice of the election, by posting notices in at least three of the most public places in the district. Such notices shall specify the place where such election is to be held, the time of opening and closing the polls, and the question to be voted upon, which notice may be in the following form, to-wit:

NOTICE OF ELECTION

Notice is hereby given that on.....day of .....1...., an election will be held at .....school district No..... in..... County, Illinois, for the purpose of voting "For or "Against" the proposition to issue bonds of district No .....to

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the amount of.....dollars due (here insert the times of payment, giving the amount falling due in each year, if the bonds mature at different days), which bonds are to bear interest at the rate of..... per cent per annum, payable.....annually.

The polls will be opened at .....o'clock .....M., and closed at .....o'cock.....M.

Dated this day.....day of .....,1..

A..... B..... President.

C..... .. D..... Clerk."

There is some evidence that some notices for some kind of an election were posted in different places but none of the posted notices nor copies of them were preserved by the directors. The president and clerk testified from their recollection that the form of the notices of election was as follows:

"Notice of Election.

Notice is hereby given that on the 7th day of April, 1917, an election will be held at the Liberty School, Dist. No. 5, in DeWitt County, Illinois, for the purpose of voting **for** or **against** the propositon to issue bonds in District No. 5, Town 21, Range 2, East of 3rd P. M. to the amount of Eighteen Hundred Dollars ($1800.00) for the purpose of building a one room School House, said bond to be issued in two equal payments, one to mature the first of April, 1918, the second to mature the first

of April, 1919, which bonds are to bear interest at the rate of not more than 6 per cent per annum, payable annually.

The polls will be opened at 1 o'clock P. M. and closed at 3 o'clock P. M. Dated this 27th day of March, 1917. (Ab. 11).

William Bethel, President.
B. E. Herrington, Clerk."

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There were no printed ballots and but four votes were cast at the election. Each of the four voters took a blank piece of paper and wrote thereon the single word "Yes." The clerk testified that the proposition supposed to be voted on was written with chalk on three black boards in the school building where the election was held, and according to his memory was as follows: "Proposition for voting of bonds to the amount of $1800.00 for the purpose of building a one, one room school house, said bond to be issued in two payments of $900.00 one to mature April 1, 1918, and one to mature April 1, 1919, said bonds to draw interest not to exceed 6 per cent." If in fact there were any alleged notices posted for said election in the form testified to by the witnesses for appellants, they were for an election to vote on the proposition "for or against" the issuance of bonds. No ballots containing any proposition of any kind whereby a voter could vote intelligently, either for or against the issuance of bonds, were provided. The four persons who did vote, (who were the judges and clerks of the election), wrote the word "Yes" upon blank pieces of paper and these were the only ballots cast at the election. Such a ballot "for or against" a proposition means nothing as there is no way of knowing whether the voter by such a ballot was in favor of the proposition or

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against it. The supposed proposition as written on the black boards near the polling booth, by some one not disclosed by the evidence, cannot be availed of to uphold the contention that a ballot marked "Yes" meant that the voter casting the ballot favored such proposition, for reasons to obvious to mention. The ballots cast meant nothing and there

was no election upon the proposition which the law could recognize.. People vs Worley, 260 Ill. 536; People vs Sullivan 247, Ill. 176. The decree of the Circuit Court is affirmed.

41a

GEN. NO. 6853. OCT TERM A. D. 1917. AG. NO. 83.

FRANK T. MOLONEY, TRUSTEE, AND THE STATE NATIONAL BANK OF MATTOON, ILLINOIS.

Appellants.

212 I.A. 640

vs

CHARLES E. LINDLEY,

Appellee.

JAMES L. FIGENBAUM,

BERTHA FIGENBAUM.

Appeal from Circuit Court Cumberland County.

ELDREDGE P. J.

This is an appeal from a decree of the Circuit Court of Cumberland County dismissing a bill for want of equity filed by appellants, who were complainants, to correct and foreclose a mortgage.

James L. Figenbaum and Bertha Figenbaum were the owners of the undivided one-half of 120 acres in the northwest quarter of Section 31, Township 10, Range 7 E. third P. M., in Cumberland County. Charles E. Lindley, the appellee, owned the other undivided half of said premises. The Figenbaums, being indebted to the State National Bank of Mattoon upon a promissory note for the principal sum of $950.00 on November 2, 1915 executed their deed of trust to Frank T. Moloney, trustee, to secure the same. In this deed of trust the premises are described as being in Township 9. This deed of trust was

the third mortgage incumberance upon the undivided interest of the Figenbaums in the premises. There was a first mortgage to the Prudential Life Insurance Company to secure a debt of $3,000.00 and a second mortgage to Walter C. Lindley, as trustee, to secure a debt of $2,100.-oo. On July 15, 1916, the Figenbaums conveyed and quitclaimed to appellee, Charles E. Lindley, their undivided one-half interest in said premises subject to all the mortgage incumberances thereon for the consideration of $150, which deed was recorded on July 18, 1916. This deed also described the land as being in Township 9. On October 19, 1916, appellee received a letter from

said Moloney, trustee, (who was also president of the appellant bank), stating, "We have been advised that you purchased the James L. Figenbaum farm, and wish to notify you herewith that we hold a mortgage amounting to $950.00 which be due November 2, 1916, together with one year's interest on same.

"You will, therefore, please arrange for same when due, and oblige."

After appellee received this letter and after a subsquent conversation by him with Moloney over the telephone, A. W. Lindley, on behalf of appellee, took the quitclaim deed to the Figenbaums who consented that the description therein might be corrected by changing the Township number from 9 to 10. This was done and the Figenbaums on November 8,

1916, re-acknowledged the deed so corrected and redelivered it to appellee who had it re-recorded on November 10, 1916.

On November 11, 1916, the Figenbaums executed a new trust deed to Moloney as trustee properly describing the land as being in Township 10, which was also recorded.

The bill filed by appellants to foreclose the trust deed charges that the misdescription in the original trust deed was a mutual mistake and asks to have the same corrected and charges that the title of appellee to the undivided one-half of said premises, derived by virtue of said quitclaim deed from the Figenbaums, is subject to the lien of the trust sought to be foreclosed. The answer of appellee among other things avers in substance that at the time he purchased the undivided one-half interest of the Figenbaums in said premises in Section 10, he had no knowledge, actual or constructive, of the trust deed of appellants.' The Figenbaums defaulted but no final decree was entered against them. The proofs were heard in open court before the Chancellor, who found that appellee, by virtue of said quitclaim deed, became a **bona fida** purchaser for value of the premises in Township 10 without any notice of any claim, right, title, interest, equity or estate, in or to the same or any part thereof in Moloney, as

trustee, or the State National Bank of Mattoon and dismissed the bill as to appellee for want of equity.

Upon the question of actual notice, James Figenbaum testified that he told appellee, before he executed the quitclaim deed to him, of the trust to Moloney. He also testified that he told A. W. Lindley, who was negotiating with him for the sale of the premises on behalf of appellee, that he would give a mortgage to secure the $950.00 note. Mrs. Figenbaum testified that she heard her husband tell appellee about appellants mortgage. Appellee and A. W. Lindley each flatly deny that they received any such information from the Figenbaums and their testimony is more or less corroborated by circumstances. The Chancellor heard these witnesses testify and was in a much better position to determine their credibility than we are. Where the evidence is heard in open court upon the oral testimony of witnesses, the finding by the court of the ultimate facts will not be disturbed by a court of review, unless in such finding there has been a clear and palpable error. Rackley vs Rackley, 151 Ill. 332; Williams vs Electric Company 160, Ill. 526; Greensfelder vs Corbett 190 Ill. 565.

It is contended that because the original deed from the Figenbaums to appellee contain the same description of the Township as number 9, appellee was in duty bound to examine the records and

the indexes pertaining to that township, and if he had done so, he would have found the record of the Moloney trust deed, and he is therefore charged with constructive notice of the same. The negotations for the purchase of the Figenbaums interest were mostly carried on by A. W. Lindley, who was a cousin of appellee, and acted in his behalf. The deed was in fact delivered to A. W. Lindley, who, before he turned over the check of appellee for the payment of the consideration, requested the abstractor to examine the records in regard to the tract in Township 10 for the purpos of ascertaining if there had been any change in the title or incumbrances placed thereon since the date of his abstract, and received the information that there

had been no change therein. Appellee himself was a farmer who already owned the other undivided one-half interest in the land and knew, as a matter of fact, that it was located in Township 10. No duty involved upon appellee to examine the records or indexes to lands in Township 9 to ascertain whether the grantors might have theretofore conveyed the lands in Township 10 under a misdescription. The record is notice, so far as land is correctly described, and no further, unless it is apparent from the record itself that there is a misdescription. Thorpe vs Helmer, 275 Ill. 86; Slocum vs O'Day 174 Ill. 215; Harms vs Coryell, 177

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Ill. 496. The burden was upon appellants to show notice and the proof thereof must be clear and positive in order to defeat the title of a subsequent purchaser. Robertson vs Wheeler, 162 Ill. 580. Facts showing mere suspicion on the part of the purchaser or want of caution are not sufficient to charge the purchaser with notice. Grundies vs Reid, 107 Ill. 304; Anthony vs Wheeler, 130 Ill. 135. The record of the trust deed describing the land as being in section 9 was not constructive notice. Curtis vs Root, 28 Ill. 367; Wait vs Smith, 92 Ill. 394. The correction of the deed in the manner mentioned would not destroy its validity. Abbott vs Abbott, 189 Ill. 448; Baker vs Baker, 239 Ill. 83; Prettiman vs Goodrich, 23 Ill. 270. Many other reasons are advanced by appellants why appellee should be charged with constructive notice but they are without merit.

While the consideration in the deed is expressed as $150.00 the real consideration, which includes the assumption of the two prior mortgages, unpaid interest and taxes, and other items, amounted to approximately $4,200.00, which the evidence shows was all or more than the undivided half interest of the Figenbaums in the land was worth. We have carefully examined the evidence in this case and conclude that it fully sustains the decree, which is therefore affirmed.

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42a

GEN. NO. 6854. APRIL TERM A. D. 1918. AG. NO. 7.

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,

212 I.A. 640

vs

JAMES BRACKEN, Plaintiff in Error.

Error to Circuit Court Vermillion County.

ELDREDGE P. J.

The plaintiff in errror was indicted at the October Term, 1917, of the Circuit Court of Vermillion County for selling liquor without a license in less quantity than one gallon, contrary to the provisions of the Dram Shop Act. Upon a trail he was convicted and sentenced to pay a fine of $50.00 and to confinement in the county jail for a period of ten days.

The offense was committed in the city of Danville, which had become anti-saloon territory in 1917, and the error assigned is that the prosecution should have been had under the Local Option Act of 1907, on the ground that the Dram Shop Act was suspended or repealed by the Local Option Act by the adoption of the latter by the city of Danville. In support of this contention, it is argued that the two acts are repugnant to each other and that the Dram Shop Act can have no application to localities which have adopted the Local Option Act. The Local Option Act does not repeal, amend or revive any other act and

its only effect is to withdraw those localities which have adopted the act from the operation of existing laws by which the sale of liquor is licensed, regulated or prohibited. The offense described in the Dram Shop Act is the selling of intoxicating liquor in less quantity than one gallon or in any quanity to be drank on the premises, while that provided by the Local Option Act is the selling, bartering or exchange of any intoxicating liquor in any quanity. People vs. McBride, 234 Ill. 146. It was held in the case of City of Decatur vs Schlick, 269 Ill. 181, that a prosecution could be had under a municipal ordinance, prohibiting the sale of the same in a city which had adopted the Local Option Act.

To the same effect is the case of City of Lewistown vs. Harrison, 282 Ill. 461. In the case of People vs Gardt, 175 Ill. Ap. 80, it was held that convictions could be had for violations of the Dram Shop Act and of the Local Option Act under different counts in the same information. The two acts are not inconsistent or repugnant to each other and do not embrace the same offenses and there in no legitimate reason why a prosecution cannot be maintained under the Dram Shop Act, even when such violation took place in territory which had adopted the Local Option Act. What has been said disposes of the other errors assigned and the judgment of the Circuit Court is affirmed.

43a

GEN. NO. 6792. APRIL TERM 1918. AG. NO. 2.

212 I.A. 641

WALTER WILSON, Defendant in Error

vs

212 I.A. 641

WILLIAM BLACK, Plaintiff in Error

Error to Moultrie

Opinion Per Curiam

Walter Wilson sued William Black before a justice of the peace to recover damages for an alleged breach of warranty in the sale of a horse. An appeal was taken from the judgment before the justice to the circuit court where a jury returned a verdict in favor of plaintiff for $100 on which judgment was rendered. Defendant prosecutes this writ of error.

The evidence shows that plaintiff in error held an auction sale at which a horse was sold to defendant in error for $202.50. The horse was warranted by plaintiff to be sound but was a "dummy." The symptons of a dummy horse are that it has a poor circulation to such an extent that its brain is affected making it without feeling at times, so that when struck with a whip it will not respond; when standing it crosses one foreleg over the other and at times it will drop down on its knees either in the stable or on the highway. The evidence shows that the horse was so affected although the plaintiff in error offered evidence of neighbors to the effect that they had not noticed any such symptons but he did not testify himself. The verdict is sustained by the preponderance of the evidence. Plaintiff in error also contends that

after the sale defendant in error before carrying out the terms of sale discovered that the horse had a splint and asked for an allowance for that defect and that the parties left it to one, Cripe, to decide if any reduction should be made for the splint and he decided that a veterinarian would not call a splint a blemish. The dummy defect was not apparent; it was at that time unknown to defendant in error and no witness testifies that that question was submitted to Cripe to arbitrate.

The only complaint made concerning the instructions is that defendant in error's instructions do not make any reference to the alleged arbitration. Since no witness testified that the question of the horse being a dummy was submitted to arbitration, there is no reversible error in the instructions. The jury were fully instructed on plaintiff in error's theory at his requset. The judgment will be affirmed.

Affirmed

44a

GEN. NO. 6845. APRIL TERM 1918. AG. NO. 5.

UPTON L. RENSHAW, Appellant.

212 I.A. 641

vs

H. M. GRISWOLD and J. E. ARMSTRONG,

Appellees.

Appeal from Sangamon.

Opinion Per Curiam

On September 23, 1916, Upton L. Renshaw sued out a writ of replevin claiming that he was entitled to the possession of certain personal property wrongfully taken from him and detained by H. M. Griswold and J. E. Armstrong. Under the writ the property was taken and delivered to plaintiff. Previous to serving the writ he had tendered to Armstrong $106.50 which, by a replication to a plea of the appellees filed in the replevin suit, he admitted he owed to Armstrong on a note secured by a chattel mortgage on the property replevied. When the writ was sued out, the plaintiff deposited the tender with the clerk of the court for the defendants. At the November Term of court the case was continued on motion of plaintiff.

At the May term, plaintiff entered a motion for leave to withdraw the tender, which was allowed, and the money tendered was repaid to him.

On June 11th, 1916, the suit in replevin was dismissed on a motion of plaintiff entered by M. A. Woodruff, his attorney. On the same day the court heard evidence presented by defendants concerning the right of plaintiff to the possession of the property replevied and found that Armstrong had a special interest in the property. Judgment was entered

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in the alternative that plain- pay $306.50 to Armstrong within ten days or make return of the property replevied within that time.

On June 16th, the plaintiff procured another attorney and entered a motion to vacate the order of dismissal and to set aside the judgment and all orders made in the cause. He filed an affidavit with his motion setting forth, that when the writ of replevin was sued out he was indeb-

ted to defendants in the sum of $106.50 which was past due and secured by a chattel mortgage on the property replevid, but that they claimed $276.50; that relying on the advice of others, he believed that when they refused to accept the tender he had the right to withdraw it, and that he was told to dismiss his suit and relied and acted on such advice, and that he was further informed that nothing could be done with the cause, except that the defendants would have a right to bring an action on his replevin bond, which could not be heard until the next term of court; that he was ignorant of the provisions of Section 22 of Chapter 119 of the Statute, and had he been advised of such statute he would have had his witnesses present and presented his defence to the claim of defendants.

The court denied the motion and plaintiff appeals.

Under Section 22 of the Replevin Act, if the plaintiff fails to prosecute his suit with effect or suffers a non suit or discontinuance, judgment shall be given for the return of the property and damages, or if the property was held for the payment of any money, the judgment may be

in the alternative that the plaintiff pay the amount for which the property was rightfully held with proper damages within a given time or make return of the property. This statute has been in force since 1845. Appellant, when he made the motion to vacate the orders entered at the May term, did not repay the tender into court. He had by the writ of replevin taken property from appellees, on which he had given a chattel mortgage that was past due and unpaid and under which they were in possession of the property. He had procured a continuance of the replevin suit and when it was again reached for trail on the advice of his attorney he dismissed his suit, as he states, under the belief and advice that all appellees could do was bring a suit on his bond which could not be tried until the next term of court.

If it be conceded that the affidavit of appellant shows a meritorious defence to a part of the claim of appellees, the affidavit admits appellees had a just claim against the property replevied and that appellant with-

drew the tender of the amount he admits to be justly due before he dismissed his suit.

The only excuse that appellant presents for not prosecuting his suit is that he was wrongfully advised that all that appellee could do was bring a suit on his bond and that that suit could not be heard until the next term of court. He had an attorney and the motions to withdraw the tender and dismiss the suit were made by appellant through his

attorney. No claim is made that appellees in any way mislead the appellant.

Such a motion is addressed to the legal discretion of the trail court. To have granted the motion of appellant would be to place a premium on chicanery and fraud. All the actions of appellant, as shown by his affidavit after he had obtained possession of the property, appear to have been taken for the purpose and with the view of postponing the trail and delaying justice. The trail court did not commit any error in denying the motion. The judgment is affirmed.

Affirmed.

452

GEN. NO. 6855. APRIL TERM 1918. AG. NO. 8.

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

vs

JOSEPH M. MOSES,

Plaintiff in Error,

Error to Hancock.

212 I.A. 641

Opinion Per Curiam

Joseph M. Moses, together with Arthur Wilson, were upon a trial by a jury found guilty of the crime of conspiracy to obtain money from Mary G. Carr by means of false pretenses, and the punishment of each defendant was fixed by the verdict at imprisonment in the penitentiary for the term of eighteen months. After overruling motions for a new trial and in arrest of judgment, the court sentenced plaintiff in error to the penitentiary for the period of eighteen months or until discharged by due process of law. Joseph M. Moses has sued out this writ of error to review that judgment.

It is urged that the court erred in overruling a motion to quash each count of the indictment and the motion in arrest of judgment, for the reasons that none of the counts either allege that the false pretenses were made with the intent to defraud or what the false pretenses were. The first count of the indictment alleges that Joseph M. Moses and Arthur Wilson on the 21st day of June, 1917, did unlawfully and feloniously, with fraudulent and malicious intent wrongfully and wickedly to obtain money from Mary G. Carr by means of false pretenses conspire, combine, confederate and agree together with each other to then

and there unlawfully and fraudulently obtain from Mary G. Carr seventy-five dollars by means of false pretenses, etc. Other counts are similiar with the exception that they allege a conspiracy to obtain property, a check, and a bank check of the value of seventy five dollars.

Under Section 46 of the Criminal Code, the section

concerning conspiracy to obtain money or property by false pretense, a count need not allege an intent to cheat and defraud and no allegation showing the character of the false pretenses in necessary. People vs. Warfield, 261 Ill. 293; People vs. Smith, 239 Ill. 91; People vs. Nall, 242 Ill. 284; People vs. Poindexter, 243 Ill. 68. There was no error in overruling the motion to quash and the motion in arrest.

It is contended that there is no evidence to sustain the verdict. Plaintiff in error and his co-defendant claim to be physicians, but there is no proof in the record that either of them is licensed to practice medicine in Illinois. Plaintiff in error claims to be a specialist in the treatment of diseases of the eye, ear, nose and throat. They made an arrangement under which they were to travel about the country districts in the state looking up chronic cases for treatment, plaintiff in error to make the examinations and his co-defendant to do the soliciting. They operated under the name of J. M. Moses & Company, Specialist. Under their arrangement the examinations by plaintiff in error were to be free, and if the patient after such examination desired treatment then they were to treat the patient under such contract as they could make. For

some time they had made Quincy their headquarters. They had been working out from Loraine for a few days prior to June 21, 1917, traveling about the country in an automobile with a hired driver of whom they made enquiries as to the age and financial condition of the people whose houses they passed. On the morning of the 21st of June, they drove by the residence of Mrs. Carr and having first found out that she was an elderly widow of means who had a daughter, they stopped at the house and Wilson went in, presented their business card and learning that the daughter was not at home made an arrangement to call in the afternoon when the daughter would be home.

They returned to the Carr residence in the afternoon and both plaintiff in error and Wilson went to the house when plaintiff in error said to Mrs. Carr and her daughter that he had come to examine the lungs of the daughter. The daughter said she did not want to be ex-

amined and Moses said he had to examine her and that he had authority to make the examination from the State Board of Health. She then submitted to his order and he examined her in a chair and in bed. They then told the mother that her daughter's lungs were badly affected, that she had consumption and had a spot on her lungs as large as half a dollar; that if she would take treatment they would cure her and if she didn't she would be dead in a year and a half. The mother protested against her daughter taking treatment from them, whereupon they told her the daughter

would have to, as they had authority from the State Board of Health to place her in Dwight Sanitarium. Mrs. Carr protested that they could not do that without her consent and they told her they had authority from the State Board of Health to take her the same as if she was insane, and that she could not see her relatives; that the State would pay for the treatment, if Mrs. Carr was not able to, but if she was she would have to pay. The mother and daughter still protesting against any treatment, they started apparently to leave stating they would send some one who would take her within the next twenty-four hours. Moses got into the automobile and Mrs. Carr called to Wilson, who told the chauffeur to "make a stall" by going for a bucket of water. They then succeeded after considerable discussion in securing a check for $75 from Mrs. Carr which they immediately cashed at the first bank they could reach. Neither plaintifl in error or his co-defendant had any authority for such action or statements from the State Board of Health. The daughter had no symptoms of tuberculosis and was well and there is no tuberculosis sanitarium at Dwight. The check was obtained by the false pretenses of the plaintiff in error and his co-defendant in pursuance of their arrangement. The evidence sustains the verdict beyond a doubt.

It is further insisted that the court erred in sentencing the plaintiff in error to the penitentiary for 18 months. The contention of plaintiff in error is that under the act of 1917, in relation to sentence and commitment

to the penitentiary of persons convicted of

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crime the sentence shall be a general sentence and the courts shall not fix the limit or duration of such imprisonment, and the term shall be for not less than the minimum nor greater than the maximum provided by law for the offence of which the person stands convicted.

The statute provides that the penalty for conspiracy to obtain money or other property by false pretenses "shall be imprisonment in the penitentiary not exceeding five years or fine not exceeding $2000 or both."

The parole act of 1909 was very similar to the present one and it was held in People vs. Hartsig, 249 Ill. 348 that that law did not apply to the crime of conspiracy under Section 46 of the Criminal Code for the reason that the parole act only applies to offences where there is a minimum and a maximum term of confinement, and there is no minimum term of confinement fixed by the statute for conspiracy to obtain money by false pretenses hence the judgment must fix the punishment. People vs. Turner, 261 Ill. 84; People vs. Hartenbower 283 Ill. 591. The statute fixing the penalty at imprisonment or fine or both, it was the province of the jury to fix the penalty.

If the verdict and judgment were erroneous in fixing the term of imprisonment, even then such parts of the verdict and judgment would be considered surplusage and the judgment would be reversed and the cause remanded for resentence only. People vs. Coleman, 251 Ill. 497; People vs. Warfield, 172 Ill. App. 1.

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Complaint is also made that an instruction:—"The court instructs you that if you believe from the evidence, beyond a reasonable doubt, that the defendants committed the crime charged in manner and form as charged in the indictment, you should find them guilty." given for the people is erroneous. This instruction was approved in People vs. Nall, 242 Ill. 284, and Parker vs People, 97 Ill. 32, which were indictments for conspiracy; there was no error in giving instructions.

Lastly it is insisted that the court erred in giving

oral instructions to the jury conserning the law of the case. The foundation for this contention is that after the court had read the instructions to the jury including the different forms of verdict, the court gave them two blank forms of verdict and told them if they found the defendants guilty they could use the form marked A. by filling in the blanks, and if they found the defendants not guilty them could use form B, which they should sign by the foreman. The court fully instructed the jury in writing as to the form of their verdict and there was no error in furnishing the jury blank forms, one of which they might use by filling in the blanks after they had agreed on their verdict. Smith vs. People 142 Ill. 117; Illinois C. R. R. Co. vs. Wheeler. 149 Ill. 525; Landt vs.McCullough, 218 Ill. 607.

There is no reversible error in the case and the judgment will be affirmed.

Affirmed

Judge Waggoner took no part in the decision of this case.

46a

GEN. NO. 6858. APRIL TERM 1918 AG. NO. 11

EVA M. HARRINGTON, Appellant,

vs

212 I.A. 641

JOSEPH QUIGLEY, Appellee.

Appeal from City Court of Canton.

Opinion Per Curiam

Eva M .Harrington brought suit in assumpsit against Joseph Quigley. The declaration consists of the common counts. Attached to the declaration is a bill of particulars which states that "plaintiff's claim is for labor as a servant for defendant at his request from April 10, 1912, until February 1, 1917, at the reasonable rate of $10 per week, amounting to the sum of $2500 and that although having demnded the same from the defendant he has not paid the same or any part thereof and therefore the plaintiff brings this her suit". Attached to this bill of particulars is an affidavit sworn to by plaintiff April 7, 1917, which states that "she is the plaintiff in the above entitled cause, that the nature of plaintiffs demand is for wages for labor as a servant as is above set forth". The defendant moved for a more specific bill of particulars and on Sept. 24, 1917, the plaintiff filed a further affidavit, which states that there was a contract of marriage entered into between the parties in June 1906, under which they were to get married; and defendant was to pay plaintiff the same wages she was earning; that plaintiff had obtained a divorce July 23, 1905, and her attorney had informed her she could not marry within one year thereafter; and that defendant agreed to consult another attorney as to when plaintiff might legally marry; that

the defendant, in obtaining a license to marry plaintiff, had made false statements; that the parties had been married and the defendant in February 1917, after they had lived together as man and wife, had had their marriage annulled and that plaintiff's claim is for wages for five years preceeding the beginning of this suit as above stated.

The defendant filed pleas of the general issue, accord and satisfaction, and illegal contract of marriage. The

defendant also filed an affidavit that "he verily believes that he has a good defence to this suit upon the merits of the whole of plaintiff's demand." Thereafter the plaintiff moved "for judgment by default" against the defendant for failure to file an affidavit of merits setting forth a statement of facts constituting the defence. The motion was overruled and an order was made that the plaintiff reply to the pleas. The plaintiff elected to stand on her motion for judgment and refused to plead further, whereupon the court entered the following order, "and afterwards, to-wit: on the 6th day of December 1917, the court dismisses the suit of plaintiff for failure of plaintiff to comply with the rule heretofore entered to plead to the pleas of the defendant instanter". The plaintiff prayed for and has perfected this appeal from that order.

The record does not show any final judgment between the parties. There is not even a judgment against either party for costs. The appellee has entered a motion in this court to dismiss the appeal for the reason it is not taken from a final judgment.

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Appeals, with certain exceptions which do not include this case, may only be taken from final judgments. An order dismissing a suit which does not render judgment in favor of either party is not a final judgment and is not an order from which an appeal may be taken. It is no bar to another suit for the same cause of action. It lacks the essential features of a judgment. Metzger vs Morley, 184 Ill. 81; Harvey vs Cochran, 103 Ill. App. 577; People vs Severson, 113 Ill. App. 496; Hastings vs Gray Dental Co., 108 Ill. App. 98; 1 Black on Judgments Sec. 31.

The so called affidavit of merits filed by plaintiff is not such as is required by the statute. It does not state the amount due or deny that defendant is not entitled to any just credits, deductions and set offs.

The motion of appellee will be allowed and the appeal is dismissed.

Appeal dismissed.

Reh'g denied Oct. 24, 1918

47

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

212 I.A. 342

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

May Humpler,
Appellant

vs.

No. 50
March Term, 1918.

John Yarbrough, Jr.,
Appellee

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

HON. W. B. WRIGHT

Term No. 50. Agenda No.53.

March Term,A.D.1918.

212 I.A. 642

May Humpler, Appellant	)	
v.	)	Appeal from Fayette.
John Yarbrough,Jr., Appellee	)	

Opinion by Higbee, J.

---oOo---

May Humpler, appellant, brought suit in the circuit court of Fayette county, against John Yarbrough,Jr., appellee, for necessary food, clothing, attention and education of their two children supplied to them by her.

In May,1908,as it appears from the proofs, appellee left appellant and their two children, then aged three and four years, and went to another state, where he secured a divorce from her, but in 1909 he returned to Vandalia, Illinois his former home, having again married. Prior to and at the time of their separation the parties and their two children lived with appellee's parents. Appellee claims to have made provision for the support of the children by leaving them with his parents and leaving money with his mother for them. Sometime after appellee's return, it appeared that appellant had him arrested for wife and child abandonment. Appellee attempts to justify his leaving appellant because of her alleged infidelity and appellant claims appellee left home with a woman whom he afterwards married. Soon after appellee left, appellant took the children and left the home of her husband's parents, and later she married one

Term No. 50. [illegible]

March Term, A.D.1910.

May Hampler, Appellant v. John Yarbrough, Jr., Appellee	Appeal from [illegible]

Opinion by [illegible].

May Hampler, appellant, brought suit in the circuit court of Fayette county, [illegible] appellee, for necessary food, clothing, medicine and [illegible] of their two children furnished to them by her.

In July, 1906, as it [illegible] from the pleadings, [illegible] left appellant and their two children, then aged three and four years, and went to [illegible] to procure a divorce from her, but in [illegible] to reside, Illinois. In [illegible], living apart from her husband at the time of their separation [illegible] and their children lived with [illegible] father. [illegible] have made provision for the support of [illegible] leaving them with [illegible] for them. [illegible] that appellant had [illegible] ment. [illegible] because of her [illegible] left home with [illegible] after [illegible] the home of her husband's [illegible]

Fred Humpler. Appellee claims that after the children were taken from his parents' home he furnished them some necessaries and was from the time he left his wife and children always ready, able and willing to support them. Appellant testified she supported the children after she took them from the home of their paternal grandparents except for a short period thereafter they spent with said grand parents. The case was tried before a jury, a verdict returned in favor of appellee, judgment rendered on the verdict and the case comes here by appeal.

Appellant assigns numerous errors but we will consider only those in support of which he cites authorities and to which he directs his argument, as under the holdings of the courts of this state, he is presumed to have waived or abandoned the other alleged errors. The trial court properly excluded testimony offered by appellant for the purpose of showing that appellee went away with another women and because of his illicit love for her left appellant and the children.

The court gave four instructions offered by appellee the giving of which is assigned as error by appellant. The first in effect tells the jury that young children have a right to be maintained and supported and that such is the father's duty in the first instance and if he fails or refuses, then such duty is cast upon the mother. The second in effect tells the jury that when father and mother have separated, if the father furnishes the children with a suitable home and necessaries, and the mother against his wishes takes them away from such home and will not allow them to be kept and supported by the father in such home, and she furnishes them necessaries, she cannot recover from the father

Fred Mangler. Appellee claims that [illegible] was taken from his parents' home to [illegible] and arise and was from the [illegible] [illegible] always ready, able and willing to support [illegible] testified she approves the adoption [illegible] the home of their natural grandparents [illegible] period thereafter they spent with said grandparents. The case was tried before a jury, a verdict [illegible] in favor of appellee, judgment rendered on the verdict [illegible] here by appeal.

Appellant assigns numerous errors [illegible] rules only those in support of which [illegible] to which or directly his argument, [illegible] the course of this case, he is presumed to have waived or abandoned the other [illegible] exclusively [illegible] allowing their appellee were [illegible] cause of [illegible] obtained.

[illegible] the giving of [illegible] first in [illegible] right to be [illegible] father's only [illegible] there, [illegible] [illegible] home and [illegible] take [illegible] kept and supported by [illegible] [illegible] [illegible] [illegible]

for the same. The third instruction in effect tells the jury that if they believe from the evidence appellee provided a suitable home for the children, with his parents, left them in such home, there furnished them with necessaries and was ready, able and willing to support them there, but that appellant would not allow them to remain and against appellee's wishes took them away and herself furnished them with necessaries, then she cannot recover from appellee. The fourth in effect tells the jury that if they find from the evidence appellee refused to furnish necessaries for his children; that appellant did furnish such necessaries, but at the time of furnishing them she did not intend to charge appellee for them but furnished them to the children without the intention of being paid therefor, then she cannot afterwards change her mind and recover for the same.

It is probable as claimed by appellee that the first and second instructions were given as one. The first might correctly state the law under certain facts but it did not correctly state the law as applicable to the proof in this case. It was the duty of appellee to support his infant children and that duty was, as between the parents, not cast upon the mother by his failure or refusal to do so. Parkinson v. Parkinson, 116 Ill.App.112; Plaster v. Plaster, 47 Ill.290. The second instruction tells the jury that the father, even though he has deserted his children, has a right to tell the mother where to maintain them and that if she maintains them elsewhere she cannot recover. The statute, however, provides, that if the husband abandons his wife "she is entitled to the custody of their minor children, unless a court of competent jurisdiction, upon application for that purpose shall

otherwise direct." (Hurd Stat.Chap.68,sec.16.) Considering the first and second instructions as one does not remove the objectionable features. The third instruction in effect requires the mother to surrender possession of her children to some one selected by the father and is in direct conflict with the statute above quoted. If the appellant was not a fit person to have the custody of the children it was appellee's duty to them and to society to apply to a court of competent jurisdiction and secure possession of them himself or the appointment of a proper custodian, but he is not permitted under the law by his neglect or inaction to absolve himself from liability for their support. The fourth instruction does not correctly state the law. The mother may by contract release the father or a court may relieve him of the liability which the law, by reason of his relationship, in the first instance imposes, but the father's liability does not depend upon the intention of the mother.

For the errors above indicated the judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

otherwise direct." (Lord Westbury, C., in Ex. parte Cossham) Considering the first and second instructions we do not review the objectionable features. The third instruction is aimed requires the mother to surrender possession of her children to some one selected by the father and is in direct conflict with the statute above quoted. If the appellant was not a fit person to have the custody of the children it was appellee's duty to them and is vested to apply to a court of competent jurisdiction and secure possession of them if necessary or the appointment of a proper guardian, but it is not permitted under the law by the methods of instruction to compelve himself from liability for their support. The instruction does not correctly state the law. The mother may by contract relinquish the father or a court may relieve him of the liability which the law, by reason of his relationship, in the first instance imposes, but the father's liability does not depend upon the intention of the mother.

For the errors above indicated the judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*8

Clerk of the Appellate Court.

OPINION

FEE, $ .....

Rehg denied Oct. 24, 1918

48a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of March in the year of our Lord, one thousand nine hundred and eighteen, the same being the 26th day of March in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Franklin H. Boggs, Presiding Justice
Hon. Harry Higbee, Justice.
Hon. James C. McBride, Justice.

212 I.A. 642

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, in vacation, after said March term, to-wit: On the sixteenth day of July A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Mary L. Horner,
Plaintiff in Error

vs.

No. 14.
March Term, 1918.

Lebanon City Coal Company et al,
Defendants in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 14. In the Appellate Court, Agenda No. 2

Fourth District.

March Term 1918.

212 I.A. 642

Mary L. Horner, Plaintiff in error. vs. A. H. Bachmann, John Fackt, Lebanon City Coal Co., Adolph Stoffel, Premier Coal & Mining Co., Emiel J. Brown, William Fritz, Phillip Lehmann, Louis Guenther, Frank Bachmann, Juella Bachmann, his wife, and Mathias Rithman, Fred Fesold, C. E. Chamberlin, Defendants in error.	Writ of error to the Circuit Court of St.Clair County, Illinois.

McBride, J.

It is disclosed by the record in this case that on May 19, 1905, the defendant, Lebanon City Coal Company, was incorporated with a capital stock of twenty-five thousand dollars, divided in to two hundred fifty shares. The principal owners of the capital stock are H. Horner, J.C. Eisenmeyer, William Kolb. Later on John Fackt purchased the forty shares of stock owned by John Eisenmeyer, and other additional shares. William Kolb advanced large amounts of money it is claimed by the defendants, amounting in all to about eighteen thousand dollars. On March 10, 1907, the company borrowed five thousand dollars from the Belleville Savings Bank and about the same time ten thousand dollars was borrowed from the Jefferson Bank of St. Louis, Missouri; the note to the Jefferson Bank was signed by Lebanon City Coal Company, also by Horner, Fackt and Kolb as sureties. This money was used in developing the mine and endeavoring to advance its financial interests,

Form No. 14. [illegible]

[illegible] Circuit Court.

[illegible] Term 1910.

Mary [illegible] Norris,

Plaintiff in error,

vs.

A. B. [illegible], John [illegible], Baron
City [illegible],
Premier [illegible],
William [illegible],
Guardian [illegible],
Big [illegible],
C. E. [illegible],

Defendants in error.

Bill [illegible]

[illegible] in the [illegible] in [illegible] said in
May 25, 1910, the [illegible] incorporated [illegible] and
dollars, [illegible] principal [illegible] Blackmer, [illegible]
the forty [illegible] other [illegible] amount [illegible]
in all [illegible]
1907, [illegible]
believing [illegible]
and [illegible]
St. [illegible]
signed [illegible]
and [illegible]
the same [illegible]

but they were unable to make the mine a success and unable to pay the indebtedness of the company, and the Belleville Savings Bank at the September Term, 1907, obtained a judgment against the company for the amount of its note, with interest and attorney's fees; and the Jefferson Bank of St. Louis also obtained a judgment against the company and the sureties for the amount of its note. It also appears from the testimony that at the time these judgments were obtained the embarrassment of the company was so great that the principal stock holders felt compelled to take care of this indebtedness individually and it was agreed between Fackt, Horner and Kolb that Horner should pay the five thousand dollar judgment to the Belleville Savings Bank and Fackt should pay five thousand dollars of the judgment to the Jefferson Bank and Kolb should pay the remaining five thousand dollars of the Jefferson Bank. At this time Kolb, as is claimed by the defendants, had advanced money to the amount of about eighteen thousand dollars for the purpose of advancing the interests of the company. Fackt paid the five thousand dollars, as agreed, to the Jefferson Bank and Horner arranged with his wife to buy the judgment owned by the Belleville Savings Bank and caused the judgment to be assigned to his wife, the plaintiff in error, hereinafter called plaintiff. Later on the directors endeavored to raise money for the purpose of paying off the indebtedness of the coal company and to complete its work, and on October 1, 1907, executed its bonds for the amount of thirty thousand dollars, secured by a mortgage on all the property owned by the coal company, but they were unable to negotiate these bonds. At about this time Kolb having advanced about eighteen thousand dollars also became financially embarrassed

and transferred his interest in the company and its capital stock to ~~Frank~~ Bachmann. Thereafter C. E. Chamberlain, at the request of the directors, endeavored to secure a loan for the defendant company, which he did, for the amount of eighteen thousand dollars upon condition that Bachmann and his wife, Packt and his wife and Horner and his wife would sign the note as surety for the coal company, and, upon the further condition, that the thirty thousand dollars of bonds issued and secured by a mortgage, as above stated, were to be placed in the hands of the Belleville Savings Bank, from whom the loan had been obtained, as collateral security. It was agreed, however, between these directors that the judgment of the Belleville Savings Bank for $5389.00 which had been assigned to the plaintiff was to be satisfied and cancelled, and this was to be taken as a part of the advancement of Horner to the company. Horner satisfied this judgment as attorney in fact but there was no power of attorney on record showing his authority to do so, and before the loan was finally completed and the money paid out it was required that Mrs. Horner, the plaintiff, enter satisfaction of this judgment upon the records, which she did. Thereupon the loan for eighteen thousand dollars was completed. The evidence shows that there was an understanding between Horner and his wife that upon the entering of the satisfaction of this judgment she was to have a note of the company for the amount of the judgment and interest, and on the same day, or the day thereafter, Horner issued and delivered to his wife a note for $5806.21, being the amount of the judgment of the Belleville Savings Bank against the coal company with interest and attorney's fees. This note was made payable to Mary I. Horner in three years and sixty days after date and was

signed by R. R. Horner, President. R. R. Horner claims that he advised the directors and principal stock holders of the making of this note but this is denied by them. Later on a dispute arose between the owners of this property as to the state of the account and as to the amount owing to each of them for advancements, etc , and a committee was appointed to make a report and it is contended by the plaintiff that the report showed an indebtedness to R. R. Horner of $2485.45, and that upon the coming in of this report R. R. Horner as President executed a note payable to himself for the amount of $2485.45, and on the same day transferred this note to his wife, the plaintiff, and claims that it was for money advanced by her to the coal company. The other members of the committee deny that such a report was made by them but say that the entry upon the report of the amount due to Horner is in his handwriting and was not made as a part of the report of the committee. It further appears that prior to the examination of the books that a "motion was made and carried that the officers and directors be authorized to execute notes of the company to A. H. Bachmann for any amount that may be found due and owing to William Kolb; also to execute notes to R. R. Horner and others, John Fackt and George Fackt that may be due and owing to them from the said company; also take any further action in executing notes for such other purposes as may be deemed necessary by the Board of Directors." Notwithstanding the amounts of money borrowed they were unable to succeed in making any money from the operation of the mine and in the fall of 1909 the owners of the stock, as claimed by the defendants, quit the operation of the mine and that R. R. Horner undertook to operate the same under a claim that he was operating it for a prog-

pective purchaser who desired to enter into a permanent arrangement. At all events, the defendants deny that the mine was being operated by the company but that it was operated by Horner individually and that he received all of the sales and profits arising from its operation. This is denied by Horner. He claims to have been operating it for the company. During this period, in the latter part of 1909 and the early part of 1910, it is contended by plaintiff that she furnished her husband with $579.45 to meet the operating expenses and pay roll for March 1910, and that she also advanced him $136.50 to pay for ties and $86.06 for freight thereon.

It further appears from the record that thereafter a verbal agreement was entered into, dictated but never signed, by which Bachmann, and Hackt, were to assume and pay the notes amounting to eighteen thousand dollars to the Belleville Savings Bank and Horner assigned all his stock and interest of every nature and description in the mine, including his claim, which the defendants contend at that time was claimed to be about eight thousand dollars, and by plaintiff to be the amount of the note for $2485.45. It further appears that thereafter an attempt was made to dissolve the corporation and the property was sold and transferred by Bachmann and Hackt to the Premier Coal and Mining Company, and it is contended by the plaintiff that this sale was void and that she is entitled to the payment of the moneys that she claims are due her out of the property formerly owned by the Lebanon City Coal Company.

The bill filed by the plaintiff, after setting forth substantially the facts above enumerated, together with other facts, alleges that the Lebanon City Coal Company is

indebted to her for the several amounts above specified and that the sale made was fraudulent as to her; that the dissolution of the corporation was unlawful and that she was entitled to be paid the several amounts due her out of the property received by the Premier Coal & Mining Company from the Lebanon City Coal Company, and asks that the "Court order and decree that the proceedings to dissolve the Lebanon City Coal Company, the deed conveying from said last named corporation the property therein described to said Frank Bachmann, and the deed conveying the property therein described from Frank Bachmann and Luella his wife to said Premier Coal & Mining Company be set aside and for naught held and that within a short day to be appointed by this court said Lebanon City Coal Company pay to the complainant the said sum of money by the court found to be due her, together with the costs of the suit"; including other charges set forth in the prayer of the bill, and that in default of such payment the master in chancery proceed to sell the corporate assets of the Lebanon City Coal Company.

The answer filed denies that the Lebanon City Coal Company is indebted to the plaintiff in any sum and denies that there was any fraud in the transfer of the property from the Lebanon City Coal Company to Bachmann, and denies that the property formerly owned by the Lebanon City Coal Company and transferred through Bachmann to the Premier Coal & Mining Company is liable for the indebtedness claimed to be due; and avers that the dissolution of the said Lebanon City Coal Company was made in the manner provided by statute.

The cause was referred to the master to take and report the testimony and report conclusions, which was done. Exceptions were taken and heard in court and after a final

hearing by the Chancellor the bill was dismissed for want of equity; to reverse which decree this appeal is prosecuted.

As to the claim of plaintiff for the note held by her for $5606.21, executed by R. H. Horner, President and payable to Mary Horner, we think a preponderance of the evidence shows that R. H. Horner agreed with Fackt and Folb to pay off, satisfy and discharge the judgment in favor of the Belleville Savings Bank and against the coal company amounting to about $5600.00, but instead of paying off and satisfying this judgment he caused it to be purchased by and assigned to his wife, the plaintiff. By this agreement Fackt was to pay five thousand dollars on the Jefferson Bank Judgment, which he did, and Folb was to pay the remaining five thousand dollars on the Jefferson Bank judgment but owing to the large advances he had made to the coal company he was unable to pay more and assigned his interest in the coal company to R. Bachmann. After Bachmann became interested it was then arranged and agreed between Horner, Fackt, Bachmann and Chamberlin that Chamberlin was to secure a loan of eighteen thousand dollars (prior to this the defendants had issued bonds to the amount of thirty thousand dollars and secured them by a mortgage upon the property of the coal company but they were unable to sell these bonds); Chamberlin arranged with the Belleville Savings Bank for a loan of eighteen thousand dollars to the company upon condition that Horner, Bachmann and Fackt, with their wives, sign their notes as security and also place the bond issue of thirty thousand dollars up as collateral. The loan was made and by agreement the eighteen thousand dollars was to be disbursed by checks signed by Horner and Chamberlin. Before any of the money was checked out it was discovered that the judgment of the

Belleville Savings Bank was not satisfied but had been assigned to the plaintiff. The parties in interest refused to proceed further until the judgment was satisfied when R.H. Horner, did as attorney in fact for his wife satisfy and release the judgment. From this time Chamberlin was to act as the financial agent of the company and receive and discharge the funds of the company. The coal business even then did not prove profitable and in September 1909 Bachmann and Backt declined to longer continue in the business, or to put up any more money to operate the plant. The notes amounting to eighteen thousand dollars given to the Belleville Savings Bank became due and the bank desired a settlement thereof. On the evening of December 18, 1911, a conference was held at the office of Winklemann & Ogle at Belleville, at which time Horner, Bachmann and Backt and their respective attorneys were present and entered into an agreement giving several options, among which was an option to Horner to sell all of his stock and interest of every kind in the coal company to Bachmann and Backt, they to pay the eighteen thousand dollars and release Horner and his wife from any liability upon these notes. This option was adopted and agreed upon. Bachmann and Backt assumed the indebtedness of eighteen thousand dollars to the Belleville Savings Bank. At this time it was discovered that there was no power of attorney on record from Mrs. Horner authorizing R. H. Horner to satisfy the judgment of the Belleville Savings Bank against the Lebanon City Coal Company that had been assigned to her, and Bachmann and Backt refused to complete the deal until satisfaction of the judgment had been entered by her. Thereupon Mrs. Horner personally entered satisfaction of this judgment. Mrs. Horner and R. H. Horner desired to be released as sureties upon the eighteen

[illegible]

[illegible] to the [illegible]

proceed further until [illegible]

however, [illegible]

[illegible] be [illegible]

the financial [illegible]

the funds of the company. [illegible]

not [illegible] and [illegible]

decline to [illegible]

more money to open [illegible]

eighteen thousand dollars [illegible]

Bank because [illegible] and [illegible]

the [illegible]

the [illegible]

Horger, [illegible]

presents [illegible]

among which [illegible]

and [illegible] of every [illegible]

and [illegible], they [illegible]

[illegible]

This [illegible]

[illegible]

Bellevilla [illegible]

there was [illegible]

[illegible]

Bellevilla [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

thousand dollar indebtedness to the Belleville Savings Bank; she and her husband were released. Her name and that of her husband were stricken as sureties upon said eighteen thousand dollar indebtedness. Horner made a sale to Bachmann and Fackt of all his stock and interest of every kind in and to the property, and credits of every kind in and to said property and released and discharged Bachmann and Fackt from all liability to him of every kind and character. Counsel for plaintiff in answer to this say that this may be true but Mrs. Horner was not a party to this agreement and not bound by it. We believe from the evidence in this record that plaintiff knew and understood that when she released this judgment she was surrendering all interest and right accruing to her by reason thereof. R. H. Horner had by his agreement in fact assumed the payment of the judgment to the Belleville Savings Bank for the amount of about $5600.00, and the payment by her to the bank was in fact and in equity a payment of his personal obligation and when he executed the note as President of the company and delivered it to her it was in fact a payment of his personal obligation; this he had no right to do and the note was not a binding obligation upon the company. The making of the note was not known to the other members of the company. It seems to have been a secret proceeding between the husband and wife. Transactions of this character between husband and wife require the closest scrutiny when they are done secretly and adverse to the interest of other parties. We do not believe that in equity she is entitled to recover the amount of this note.

It is next contended by plaintiff that the Lebanon City Coal Company is indebted to her upon the note executed by ~~Henry~~ R.H. Horner payable to himself and endorsed by him and

delivered to plaintiff in the amount of $2485.00. As appears from the evidence there was some disagreement between the principal owners of the stock as to the amount she had advanced for the purpose of carrying on the business and a committee was appointed to investigate these accounts and determine this matter and it is claimed by plaintiff that this committee reported $2485.00 as due R.H. Horner and that after this report was made R.H.Horner executed a note to himself for this amount and delivered it to her and claimed it was for money advanced by her. The other members of the committee deny that any such amount was found to be due R. H. Horner and claim that the statement in the report of $2485.00 due R.H.Horner was not made by them but that it was in the handwriting of Horner and that they in fact found not $2485.00 due but that Horner had advanced between seven and eight thousand dollars to the company, which included the judgment above referred to. Whatever the facts may be with reference to this report, the resolution under which the committee was appointed provided that for any amounts found due to Horner, Bachmann or others that the officers and directors were authorized to execute notes of the company to them respectively for the amounts so found to be due. Horner did not obtain the signatures of the other directors to this note but executed it as President and payable to himself, and this, we think, was without authority and was in direct violation of the terms of the resolution, and did not constitute a valid obligation of the company, and the assignment of it to his wife would not make it such. She could see that he was executing a note of the company to himself and if she accepted it in payment of any claims that she had she did so at her peril. We do not believe that this is a valid claim.

The plaintiff further claims that in the latter part of 1909 and the early part of 1910 she furnished and advanced money to Horner to pay the miners wages to the amount of $579.46 and that during the same period two car loads of ties were purchased for which she advanced $136.[illegible] and $86.00 freight thereon.

It appears from the record in this case that in September 1909 the other directors and stock-holders had advised Horner that they did not propose to operate the plant any longer and that R. L. Horner undertook the operation of the plant, either by himself or for a lessee, and that he received all of the earnings of the plant and paid all of the expenses thereof and was in fact operating the plant himself, and the money claimed to have been furnished by plaintiff for the operation of this plant during this period was, as we think, furnished to her husband R. L. Horner and that he alone is liable therefor.

It is further insisted by the plaintiff that the company was never dissolved in the manner provided by statute and that any sale made to Bachmann or the Premier Coal & Mining Company was void. In the view we have taken of this case we do not deem it necessary to consider this question as we have all ready found that the Lebanon City Coal Company was not in any manner indebted to this plaintiff and if it was not then whether the dissolution was regular or irregular could not in any manner affect the rights of the plaintiff.

After a careful consideration of this record we are unable to say that the findings of the Chancellor were contrary to the evidence, or that the decree was erroneous, and the decree of the lower court is affirmed.

AFFIRMED.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*8

Clerk of the Appellate Court.

OPINION

FEE, $ .....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 642

Sallie G. Owens,
Plaintiff in Error

vs.

No. 13
March Term, 1918.

Charles L. McMackin,
Defendant in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. ALBERT M. ROSE

Term No. 13. In the Appellate Court Agenda No.37

of Illinois, Fourth District.

March Term A. D. 1918.

Sallie G. Owens, Plaintiff in Error	212 I.A. 642
vs.	Writ of Error To Circuit Court
Charles L. McMackin, Defendant in Error	Marion County, Ill.

Opinion by Boggs, P. J.

Plaintiff in error, hereafter called plaintiff, brought suit against defendant in error, hereafter called defendant, in an action on the case in the Circuit Court of Marion County for alleged misuse of legal process in attempting to have plaintiff in error declared insane. The damages were laid at $500,000.00.

At the close of plaintiff's evidence on motion of defendant, the court directed a verdict in favor of the defendant and rendered a judgment thereon against plaintiff in bar of action and for costs. To reverse said judgment plaintiff prosecutes this writ of error.

The plaintiff, while not a lawyer, appeared in her own behalf and tried her case in the court below and also in this court. The record discloses that counsel representing defendant, as well as the court, were very lenient in allowing plaintiff to present her side of the case.

We have read the abstract and the larger part of the record in this case and giving to the plaintiff's case

Term No. 12. In the Appellate Court Agenda No. 37

of Illinois, Fourth District.

March Term A. D. 1911.

Sallie E. Owens,

Plaintiff in error

vs.

Charles I. Newcomb,

Defendant in error.

NISI A. GAS

Opinion by Cogle, J.

Plaintiff in error, Appellee [illegible] brought suit against defendant in error, [illegible] defendant, in an action on its case in the circuit [illegible] Marion County for alleged [illegible] tending to have plaintiff in error declared [illegible] damages were [illegible].

At the close of plaintiff's evidence [illegible] of defendant, the court directed a verdict for the defendant [illegible] judgment [illegible] in bar of recovery and for costs. [illegible] plaintiff prosecutes a writ of error.

The [illegible] her own behalf [illegible] also in this court. [illegible] respondents defend it, [illegible] instant the [illegible] suit to [illegible] case.

[illegible] the record in this case [illegible]

the most favorable consideration, we are unable to find that the evidence, together with all inferences reasonable to be drawn therefrom, show a cause of action. The court in our judgment did not err in directing a verdict in favor of the defendant.

No good purpose would be served in discussing the evidence in this case, the greater part of which is made up of the testimony of the plaintiff, and we therefore content ourselves by saying that the court did not err in directing said verdict and rendering judgment thereon, and the judgment of the trial court will therefore be affirmed.

Judgment affirmed.

Not to be reported in full.

the most favorable consideration, we are unable to find that the evidence, together with all inferences reasonably to be drawn therefrom, show a cause of action. The court in our judgment did not err in directing a verdict in favor of the defendant.

In good faith we could be never in discussing the evidence in this case, the greater part of which is made up of the testimony of the plaintiff, and we therefore conclude ourselves by a view that the court did not err in directing said verdict and rendering judgment thereon, and the judgment of the trial court in therefore affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*0

Clerk of the Appellate Court

OPINION

FEE, $ .....

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 342

Martha F. Frailey,
Appellant

vs.

No. 16
March Term, 1918.

Ale Rose,
Appellee

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Hardin COUNTY

TRIAL JUDGE

HON. J. C. KERN

Term No. 16. In the Appellate Court Agenda No.2
of Illinois, Fourth District.
March Term, A. D. 1918.

Martha E. Brailey, appellant	)	**212 I.A. 642**
vs	)	Appeal from Circuit Court
Ale Rose, appellee	)	Hardin County.

Opinion by Boggs, J.

Suit was instituted by appellee against appellant before a Justice of the Peace of Hardin County, resulting in a judgment against appellant for $197.6 . On appeal taken by appellant to the County Court of said County a trial was had resulting in a verdict and judgment in favor of appellee for $200.00. To reverse said judgment this appeal is prosecuted.

The record discloses that appellant, the owner of certain farm lands in said county had leased the same to appellee for the year 1916, under the terms of leasing, appellee was to farm said land in corn and was to pay appellant as rent therefor, one half of the corn grown on the land. It seems there were two tracts of this land, one containing 20 acres, and the other about thirty acres. On the twenty acre tract appellee had gathered all of the corn with the exception of some six acres. For some reason he ceased husking the corn in this field and begun husking on the other tract rented by him from appellant, whereupon appellant's husband as her agent begun husking the remaining six acres

of the twenty acre tract and threw the same in a crib on appellant's farm, locking the door to said crib. It appears further from the record that appellant levied a distress warrant on appellee's crop including the corn gathered by appellant's husband and placed in her crib. Thereafter appellee and appellant entered into a compromise agreement by which all of the corn raised by appellee and which had not been marketed with the exception of the corn husked by appellant's husband and placed in the crib as above set forth was to be sold and the proceeds to be divided in the manner stipulated by the parties.

The record further discloses that appellant agreed to purchase appellee's interest in the corn in the crib and to pay him 80¢ per bu. therefor. Appellant also agreed to pay to appellee 80¢ per bu. for 22½ bushels of corn estimated to have been destroyed by appellant's hogs before the corn had been gathered from the field. It is contended by appellee that Dan Walton, constable, who had levied said distress warrant was to weigh the corn husked and placed in the crib by appellant's husband on the Saturday following their agreement. On that Saturday Walton and appellee went to the home of appellant for the purpose of weighing said corn. Appellant's husband stated that they were not ready to weigh the corn that day; that he was busy shredding corn and that he wanted his son, Arthur, to assist in the weighing and for them to come back on some other time. Appellee very shortly thereafter brot suit against appellant to recover for the value of his share of the corn in the crib at 80¢ per bushel and for the 22½ bushels of corn estimated to have been destroyed by appellant's hogs.

It is first contended by appellant that the verdict of the jury is against the manifest weight of the evidence. About the only matter there is any conflict in the evidence with reference to is as to the amount of corn husked by appellant's husband and placed in said crib. The evidence on the part of appellee's witnesses tends to show that there were some 17 or 18 loads of this corn and that the loads would average something like twenty-seven and a half bushels per load. On the other hand appellant's evidence is to the effect that he weighed this corn and that it only weighed out about 288 bushels. Appellant further testified that none of the corn had been taken out of the crib. While the evidence on this point is conflicting we are not able to say that the finding of the jury is against the manifest weight of the evidence in regard to the amount of the corn.

Appellant also insisted that appellee was owing her about $46.40 for seed corn, two cultivators and certain other articles purchased by appellee from appellant and that she did not receive credit therefor. Appellee positively denies having purchased the two cultivators but practically admits the remainder of the bill. In other words, appellee in effect admits owing appellant $16.40. If the testimony of appellee's witnesses is to be believed there was about 495 bushels of corn in the crib, one half of which, together with the twenty-two and one half bushels, would make 270 bushels of corn belonging to appellee. This at eighty cents per bushel would amount to $216.00. Allowing appellant credit for the $16.40 which appellee admits owing to her would leave appellant indebted to appellee in the sum of $199.60, or forty cents less than the amount of the jury's verdict. We are, therefore, of the opinion the evidence

It is first contended by appellant that the verdict of the jury is against the manifest weight of the evidence. Count the only witness there [illegible] a direct in the evidence with reference to be as to the quantity of corn moved by appellant's husband and placed in said crib. The evidence on the part of appellant's witnesses tends to show that there were some 17 or 18 loads of the corn and [illegible] would varies according from twenty-two [illegible] per load. On the other hand appellee's witness testified to the effect that he weighed two corn and [illegible] about 280 bushels. [illegible] the corn had been taken out of the crib. [illegible] evidence on this point is conflicting, [illegible] the weight of the evidence in regard to the amount [illegible].

[illegible] about [illegible] articles purchased by [illegible] not receive credit therefor. [illegible] having purchased [illegible] the remainder of the bill. [illegible] left merely [illegible] appellee's [illegible] bushels of corn [illegible] with the twenty-two [illegible] bushels of corn [illegible] cents per bushel [illegible] just [illegible] her would [illegible] of [illegible] evidence. [illegible]

in the record is amply sufficient to support the verdict and judgment.

It is next contended by appellant that the court erred in its rulings on the evidence. The only ruling of the court which is referred to in appellant's brief is with reference to certain questions asked of appellant's husband on cross examination. We have examined the record in regard thereto and do not find that the court erred in its rulings on said cross examination.

It is next contended by appellant that the court erred in giving three instructions given on behalf of appellee and in the refusal of two instructions tendered by appellant and which were refused by the court. These instructions are not contained in the bill of exceptions and while they have been made a part of the transcript by the clerk, they do not thereby become a part of the record and are therefore not before us for consideration. I. C. R. R. Co. v. Hendrick, 190 Ill. 504; C.I. & St.L.Ry.Co.v.Harper, 126 Ill.354; Arnold v. Neilson, 272 Ill.384.

In C.I. & St.L.Ry.Co. vs. Harper, supra, the court at page 385 says: "Upon an examination of the record it will be found that the instruction does not appear in the bill of exceptions, and hence it can not be regarded as a part of the record. In this case, as in Chicago, Milwaukee and St.Paul Railway Co. v. Yando, 127 Ill.214, the original bill of exceptions was brought up by agreement, but the instructions were not copied into the bill of exceptions, but were sent up with the transcript. In the case cited, it was held that the instruction, not being in the bill of exceptions, formed no part of the record, and could not be considered."

It might be said too in connection with the instructions purporting to be a part of the transcript in this case, that the record does not disclose by whom said instructions were tendered.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*0

Clerk of the Appellate Court

OPINION

FEE, $ .....

5/a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

Frank Easley, Admr. etc.,
Defendant in Error

vs.

No. 26
March Term, 1918.

Wm. J. Jackson, Receiver of the
C. & E. I. R. R. Co.,
Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

212 I.A. 642

Circuit COURT

Franklin COUNTY

TRIAL JUDGE

HON. J. C. EAGLETON

Term No. 26 | In the Appellate Court of Illinois, Fourth District March A. D. 1918 Term. | Agenda No.40

212 I.A. 642

Frank Easley, administrator of the Estate of Albert P. Brown, Jr. deceased Defendant in Error vs. William J. Jackson, Receiver of the Chicago & Eastern Illinois Railroad Company, Plaintiff in Error	Writ of Error to Circuit Court Franklin County, Illinois.

Opinion by Boggs, P. J.

A writ of error was sued out by William J. Jackson, Receiver of the C. & E. I. R. R. Co., to reverse a judgment rendered in favor of Frank Easley, Administrator of the Estate of Albert P. Brown, Jr., deceased by the Circuit Court of Franklin County.

The record discloses that on September 4th, 1915, Albert P. Brown, Sr., his son, Albert P. Brown, Jr., then about five years and two months of age, together with two men, a Mr. Dixon and Mr. McDonald, were riding in a Maxwell automobile owned and driven by one Oscar A. Moongham, had started from West Frankfort and were going to Johnson City, Illinois, a distance of some five or six miles. These parties travelled south from West Frankfort until they reached the public highway, known as the County Line between the counties of Franklin and Williamson; they then turned and proceeded West on the County Line road until they collided with a passenger train on the C. & E. I. R. R. Co., whose

Term No. 28 In the Appellate Court Agenda No. 40

of Illinois, Fourth District

March A. D. 1918 Term.

Frank Dailey, administrator of the estate of Albert E. Brown, Jr. deceased Defendant in error vs. William G. Jackson, Receiver of the Chicago & Eastern Illinois Railroad Company, Plaintiff in error	Writ of Error to Circuit Court Franklin County, Illinois.

21214.642

Opinion by Boggs, J. E.

A writ of error was sued out by William G. Jackson, Receiver of the C. & E. I. R. R. Co., to review a judgment rendered in favor of Frank Dailey, administrator of the Estate of Albert E. Brown, Jr., deceased, by the Circuit Court of Franklin County.

The record discloses that on Sunday, July 21, Albert E. Brown, Jr., his son, Albert E. Brown, Jr., then about five years and two months of age, together with two men, i.e. Dixon and Mr. Bohnenkamp, were riding in a special automobile owned and driven by one [illegible], and started from West Frankfort and [illegible] Illinois, distance of [illegible] miles, to [illegible] the travelled road from West Frankfort to the public highway, known as the [illegible] in the counties of Franklin and Williamson, [illegible] proceeded east on the County line road [illegible] with a passenger train on the C. & E. I. R. R. [illegible]

track and right-of-way intersect and cross the county line highway about one half mile west of the intersection of the county line road and public road running north and south. As a result of this collision all of the occupants of the car were killed except Mr. Dixon and the car was demolished. For the injury and death of Albert H. Brown, Jr., deceased, this action is being prosecuted.

By stipulation parties agreed that the declaration consists of three counts filed at the February term 1916 and one additional count filed June 17, 1916. The first count charges negligence generally; the second count, negligent operation of the train, excessive speed, etc.,; the third count charges negligence in operating the train without ringing a bell of thirty pounds in weight, or blowing a whistle as provided by statute; the fourth count charges negligently permitting a growth of weeds to remain on the right-of-way whereby the view of the train was obstructed. To said declaration the general issued was pleaded. A trial was had and a verdict returned finding the Company guilty and assessing the damages at $1800. To reverse said judgment this writ of error is prosecuted.

Plaintiff in error contends for a reversal of the judgment in this case upon the following grounds. First, that it is not guilty of the negligence charged in the declaration; second, that there is a variance between the pleadings and the evidence, and third, that there can be no recovery for the want of due care on the part of the father of defendant in error's intestate for the safety of his infant son.

It is contended by defendant in error that the Company was negligent in operating its said train at an excessive rate of speed; that it neglected to give the statutory

track and right-of-way interest and cross the county road
highway about one-half mile west of [illegible]
county line road and public road [illegible]
as a result of the collision all of the occupants of the
car were killed save [illegible] and the [illegible]
for the injury and death of [illegible] and [illegible]
this action is being prosecuted.

[illegible] plaintiff's petition [illegible]
consists of three counts filed at the [illegible]
and one additional count filed June 17, 1924. [illegible]
charges negligence generally; the second count, [illegible]
operation of the train, necessary speed, [illegible]
count charges negligence in operating the [illegible] time-
ing a wall of thirty sounds in rental, [illegible]
as provided by statutes; the 4th count [illegible]
permitting a small of weeds to remain on the [illegible]-way
whereby the view of the train was obstructed. [illegible]
laration the general issued was plaintiff [illegible] and
a verdict returned [illegible] the
the court on [illegible]
of error is prosecuted.

[illegible]
judgment in [illegible]
it is [illegible] charged in [illegible]
second, that there is a variance between [illegible]
the evidence, and third, that there [illegible]
the work [illegible]
in error's instructions [illegible]

It is contended by defendant [illegible]
County [illegible] negligence in open [illegible]
negative [illegible]

signals and warnings and negligently permitted weeds to grow along the Railroad right-of-way so as to obstruct the view of an approaching train. There is no evidence in the record that the train was travelling at an excessive or dangerous rate of speed. On the contrary, the positive evidence in the record is to the effect that plaintiff in error's train was being operated on its regular schedule and was not running to exceed thirty-five or forty miles per hour at this point.

It might be observed in this connection that except where controlled by municipal ordinances a railroad company is not required to regulate the speed of its trains except in so far as may be necessary for the safety of the passengers carried. The duty in this regard is one owing by the railroad company to its passengers and not to persons travelling along the public highway. C. [illegible] I.R.R.Co. v. Harwood, 80 Ill.91; T.& P.R.R.Co. v. Hirschbacher, 63 App.147; C.& N.W.Ry.Co. v. Dunker, 81 App.621; C.[illegible] R.R. Co., v. Lee, Admx. 68 Ill.582.

In the last case cited the Supreme Court holds, "There is nothing in the charter of the company, nor in the general laws of the State, which imposes any restraint as to the rate of speed its trains may be run. When not prohibited by municipal regulations, it is apprehended, the company may adopt such rate of speed as it shall deem advisable, provided, always, it is reasonably safe to the passengers being transported. It will be subject to no liability for the rate adopted, if the company is not otherwise at fault."

It is next contended by defendant in error that plaintiff in error, was negligent in failing to give the

signals and warnings and intelligent operation [illegible] a view along the railroad right-of-way so as to [illegible] the view of an approaching train. [illegible] a [illegible] conditions the train was [illegible] waiting at an [illegible] [illegible] or road. [illegible] the record is to the effect that [illegible] train was being operated in the [illegible] ning, to avoid [illegible] point.

[illegible]

[illegible] cent where controlled by [illegible] company is not required to [illegible] except to [illegible] passengers carried. [illegible] by the railroad company [illegible] cons travelling [illegible] v. [illegible] 16; [illegible] Co., v. [illegible] Co., [illegible].

[illegible]

[illegible] general law [illegible] the [illegible] [illegible] company [illegible] [illegible] passenger [illegible] [illegible] [illegible]

statutory signals by ringing the bell and sounding the whistle on its engine. Numerous witnesses testified on behalf of plaintiff in error to the effect that the statutory signals were given approaching this crossing; that two long blasts and two short blasts of the whistle were blown at the whistling post one-fourth mile south of the roadway in question and that the engine of plaintiff in error was equipped with a bell weighing about 60 pounds, operated automatically, and that this bell was started ringing at the water tank some distance south of the public highway in question where the accident occurred and that it was rung continuously up until the time of the accident. These witnesses who so testified were in a position to know and to testify with accurate knowledge in regard to this matter. On the other hand several witnesses on the part of defendant in error and some witnesses who testified on behalf of plaintiff in error testified to the effect that they did not hear the bell rung or whistle sounded, but none of these witnesses so far as the record discloses undertake to say that the bell was not rung or that the whistle was not sounded, but simply that they did not hear it. The great majority of the witnesses testified that they did not know whether the bell was rung or the whistle sounded. The testimony so relied on by defendant in error with reference to the ringing of the bell and the sounding of the whistle was all in the nature of negative testimony and under the repeated decisions of the supreme and appellate courts of this state this character of testimony is not to be given the same weight and effect as positive testimony to the effect that the bell was rung and the whistle blown. C.M.& P.Ry.Co.v. Jones, 135 App.386; Hawk v. Peoria R.R.Co. 154 Ill.App.473-476; C. & [illegible] Co.v.Gill,

19 Ill.500; C.& A.R.R.Co. v. Gretzner, 46 Ill.75; C.B.& Q. R.R.Co. v. Stumes, 55 Ill.374; West Chicago St. Ry. Co. v. Fueller, 165 Ill.499.

It is next contended by defendant in error that weeds on the right-of-way of plaintiff in error's track so obstructed the view of persons travelling on said public high-way that it would be impossible for them to see a train approaching from the south. The evidence discloses that beginning at a point on the right-of-way just south of the public high-way in question there was a cut varying from one foot, just south of said public high-way, to more seven or eight feet, at a point 4[illegible] to 600 feet south of the public highway, and that on the embankment thrown up on the sides some weeds were allowed to grow. Practically, however, the whole of the testimony, both for the plaintiff in error and the defendant in error, is to the effect that the embankment together with the weeds on the embankment were not as high as the top of the train. In other words, the top of the ordinary passenger train, such as the one in question, would be some two to five feet above the top of the weeds.

The evidence is further to the effect that beginning at a point one-fourth of a mile east on the right-of-way on this county line road running up to within 15[illegible] to 20[illegible] yards of the railroad track, the view looking toward the railroad right-of-way south of the public highway was unobstructed for something like from one-half to three-quarters of a mile running south from the public high-way. The reason why the view of the railroad for a short distance on the county line road was obstructed was because there was a dip in the road at this point and weeds along the county line road and in the field between the county line road and the railroad had been

10 111.500; [illegible] v. [illegible],
R.R.Co. v. Stumpe, 10 [illegible]
Mueller, 185 111.42[illegible]

It is not [illegible]
weeds on the right-of-way [illegible]
obstructed the view of [illegible]
high-way that it was [illegible]
approaching from the [illegible]
beginning of a point [illegible]
public high-way in [illegible]
feet, just south of [illegible]
eight feet, at a point [illegible]
highway, and that in the [illegible]
some weeds were also [illegible]
whole of the testimony [illegible]
the defendant [illegible]
together with the weeds on the [illegible]
as the top of the train. [illegible]
ditary passenger train, [illegible]
be some two to five feet [illegible]

The will [illegible]
ning at a point [illegible]
on this county line [illegible]
of the railroad track, [illegible]
right-of-way south of [illegible]
something like three [illegible]
running to the [illegible]
view of the railroad [illegible]
road was constructed [illegible]
at this point and [illegible]
ridd between the county line [illegible]

allowed to grow up so that the view of the traveller at this point was so obstructed that he could not see the railroad track or train. The uncontradicted evidence, however, is to the effect that from a point about eighty feet east of the right-of-way of the railroad company, a train approaching from the south could be easily seen, and when you reached a point some fifteen or twenty feet from the railroad track you had a clear view of the same as the track at this point was practically straight. We, therefore, draw the conclusion that inasmuch as the record discloses that the automobile in question was being driven from twelve to twenty miles per hour, the driver of the automobile could have easily stopped the same after reaching this point some eighty feet east of the railroad track if he had attempted to do so, even though prior to that time he had never seen the train at all.

The record further discloses there was a railroad crossing sign on the right-of-way in the public highway and that this sign could have been seen for a quarter of a mile down the road along the line of travel by the occupants of the automobile. We, therefore, hold in view of the record in this case that the weeds on the right of way was not the proximate cause of the injury and death of defendant in error's intestate.

Plaintiff in error made a motion at the close of defendant in error's testimony and again at the close of all the evidence in the case to exclude the evidence and to direct a verdict in its favor. This motion was denied and the ruling of the court thereon is assigned as error. It is the contention of plaintiff in error that there was a variance between the allegations of the declaration of defendant in error and the proofs. The declaration averred that

allowed to grow up so that the view of a [illegible] at this point was so obstructed that [illegible] track or train. The uncontradicted evidence, however, is to the effect that from a point [illegible] the right-of-way of the railroad, [illegible] from the south could be [illegible] between a point some fifteen or twenty [illegible] had a clear view of [illegible] practically all [illegible] that immediately [illegible] question was being driven [illegible] the driver of the automobile [illegible] same after crossing this point [illegible] railroad track [illegible] prior to that time he had never [illegible]

The record [illegible] crossing sign on the right-of-way [illegible] that this sign [illegible] down the road [illegible] the automobile. [illegible] this case [illegible] proximate cause [illegible] intestate.

[illegible] defendant in error [illegible] all the evidence [illegible] direct a verdict [illegible] the ruling [illegible] by the court [illegible] variance between [illegible] fundamental error [illegible]

defendant in error's intestate was in the exercise of due care for his own safety but the declaration nor any count thereof no where avers that the father of defendant in error's intestate was in the exercise of due care for the safety of his son, whom the evidence discloses was between five and six years of age. This specific point was made in the court below, not only on the motion to exclude the evidence but on objection as the evidence of defendant in error was offered on the hearing. Beyond question, in this State, the law is that there can be no recovery by an administrator for the death of an infant under the age of seven years where suit is brought for the benefit of the next of kin and where said infant was in the custody and control of its parents without showing that the parents were in the exercise of due care for the safety of the child. In other words, if the parents were guilty of contributory negligence in not properly looking out for the welfare and safety of the child there can be no recovery. Chicago City Ry. Co. v. Wilcox, 138 Ill.378; Chnesorge vs. Chicago City Ry. Co. 259 Ill.416.

The Supreme Court in both of these cases goes into the discussion of the question as to whether or not before there can be a recovery by an administrator for the benefit of the next of kin it must be shown that the negligence of the parents in no way contributed to the death of the child before there can be a recovery. The court holds in these cases, that while the negligence of the parent can not be imputed to the child when suit is brought by the child to recover for injuries suffered by it, where the injury resulted in the death of the child and the suit is brought by the administrator for the benefit of the next of kin and that then the negligence of the parents, if shown, is a bar to a right

defendant in error's intestate was [illegible] for his own safety but the [illegible] no more aware that the [illegible] of defendant in error's intestate was in the exercise of [illegible] son, upon the evidence disclosed [illegible] years of age. [illegible] low, not only on the ground [illegible] objection as the evidence [illegible] on the hearing. Beyond [illegible] is that there can be [illegible] death of an infant under [illegible] brought for the benefit of the [illegible] fact was in the custody and control of [illegible] showing that the parents were [illegible] the safety of the child. [illegible] guilty of contributory negligence [illegible] for the welfare and safety of the [illegible] covery. Chicago City Ry. Co. v. [illegible] Chicago City Ry. Co. [illegible]

The [illegible] the question [illegible] there can be a recovery [illegible] of the death of [illegible] the negligence in [illegible] before there can be [illegible] cases, it is [illegible] trusted to the [illegible] cover for injuries [illegible] in the death of the [illegible] administrator for the [illegible] the negligence or [illegible]

of recovery on the part of the administrator.

In Ohnesorge v. Chicago City Ry. Co. supra, the court at page 433 says: "The case of Chicago City Railway Co. v. Wilcox, 138 Ill. 370, was a suit brought by a minor, by his next friend, for personal injury. In that case this court considered the questions involved with great care. The previous cases in this State were re-examined. One of the contentions made there was that the contributory negligence of the parent was a bar to the suit brought for the benefit of the child. The court there for the first time distinguished between that case and a suit brought by a parent for loss of service or under the statute for wrongfully causing the death of a child, and it was held that contributory negligence was no defense to the suit by the child brought for compensation for his injuries, while if the suit were under the statute for causing the death of the child, or by a parent for loss of services, the doctrine of contributory negligence would apply."

"In the case of City of Pekin v. McMahon, 154 Ill. 141, this court again announced the rule that contributory negligence of the parents is a defense to an action brought by the administrator for negligently causing the death of a child. A child eight years old was drowned while playing on some floating timbers in a pit filled with water, which was under the control of and maintained by the city. Mr. Justice Magruder, who delivered the opinion of the court, on page 153 said: 'In Chicago City Railway Co. v. Wilcox, 138 Ill.37 , we held that where a suit for damages caused by the negligence of the defendant is brought by a child of tender years, the negligence of his parents cannot be imputed to him in support of the defense of contributory

of recovery on the part of the [illegible].

In Gunnstorp v. [illegible], the court at page 433 says: "In case of [illegible] filicor, 158 Ill. 27, [illegible] next friend, for [illegible] considered the [illegible] previous cases in [illegible] contributory [illegible] the parent was a [illegible] the child. The [illegible] between that [illegible] of service or [illegible] death of a child, [illegible]ence was no cause [illegible] compensation for [illegible], [illegible] the statute [illegible] parent for [illegible] negligence could not [illegible]."

"In the [illegible] 142, this court [illegible] negligence [illegible] by the [illegible] a child. A child [illegible] ing on some [illegible] which was [illegible] Mr. Justice [illegible] court, [illegible] filicor, [illegible] cured by the [illegible] said of [illegible] be limited to [illegible]

negligence. Here, however, the suit is brought by the father, as administrator of a deceased child. In such a case the contributory negligence of the parents, if it exists, may be shown in bar of the action.'" The law being as above stated there was a variance between the pleadings and the evidence and advantage was taken of such variance in apt time.

But waiving the question of a variance, it still remains for us to determine as to whether or not the father of defendant in error's intestate was guilty of negligence which was the cause of or which contributed to the injury and death of defendant in error's intestate. We do not believe that anyone can read the record in this case and not be impressed with the idea that if the occupants of the automobile in question had made reasonable use of their ordinary faculties of seeing and hearing, they could have observed the train in question in time to have avoided the accident. The preponderance of the evidence would indicate that the automobile ran into the engine or ran against the engine, rather than that the engine ran against the automobile. The physical facts in the case would indicate that the automobile struck the engine and not that the engine struck the automobile. Some of the slats on the cow-catcher were scratched or cracked and there was a scar or injury to the steam chest on the side of the engine indicating that the engine was passing in front of the track of the automobile at the time the collision occurred. We do not believe that the evidence in this record fairly tends to prove that the occupants of the car were in the exercise of due care for their own safety.

It is contended by defendant in error that even though the driver of the automobile was negligent, that his

negligence. Here, however, the [illegible]
father, as administrator of a deceased [illegible]
case the contributory negligence of [illegible]
lute, may be given in bar of the action [illegible]
as above stated there was a verdict [illegible]
and the evidence and argument [illegible]
in apt time.

But waiving the [illegible]
remains for us to determine [illegible]
of defendant in error's [illegible]
which was the cause of [illegible]
death of defendant in error's [illegible]
that anyone can read the record [illegible]
proved with the [illegible]
in question and [illegible]
tion of seeing the [illegible]
train in motion in [illegible]
proximately at the [illegible]
moving from and [illegible]
than that the [illegible]
cal [illegible]
about the [illegible]
mobile. [illegible]
or crossed [illegible]
on the [illegible]
passing in front [illegible]
the collision [illegible]
in this second [illegible]
the car was in the [illegible]

It is [illegible]
through the [illegible]

negligence cannot be imputed to the father of defendant's intestate or to defendant's intestate. Counsel is correct on this proposition. The negligence of the driver is not to be imputed to the other occupants of the car but the law is that the occupants of an automobile or buggy who are riding in the same, either as an invited guest or in a hired conveyance, may also be negligent in failing to caution or admonish the driver of impending danger. We think the record in this case discloses such facts and circumstances surrounding this accident as to call upon the father of defendant's intestate to exercise his faculties of seeing and hearing for the safety of himself and for his infant son and to admonish, if necessary, the driver of the automobile not to heedlessly drive on to this railroad crossing without having used proper precautions to ascertain whether or not a train was approaching. Failing to do so he was guilty of negligence contributing to this injury and to the death of his child and under the law as laid down by the Supreme and appellate courts, his negligence bars a recovery on the part of the administrator.

In the case of Flynn v. Chicago City Ry. Co. 250 Ill. 465, the court says: "Where a passenger has reason to apprehend danger he is not at liberty to leave the exercise of due care to the driver, alone. For example, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both were killed by a collision at a crossing, in an action brought by the administratrix of the wife against the railroad company it was held that she had no right, because her husband was driving, to omit some reasonable and provident effort to see for herself that the crossing was safe, and that she was bound to look and listen.

negligence cannot be imputed to [illegible] adverse interests or to defendant's [illegible] on this proposition. The negligence [illegible] imputed to the other occupants of the [illegible] that the occupants of an automobile [illegible] in the case, either is an invited guest [illegible] negligence, may also be negligent in [illegible] the driver of incurring danger. [illegible] case disclosed such [illegible] in accident as to call upon the [illegible] to exercise his faculties [illegible] safety of himself and for his [illegible] necessary, the driver of the automobile [illegible] drive on to make [illegible] proportions to [illegible] ing. Failing to [illegible] putting to use [illegible] under the law [illegible] country, its [illegible] authoritative.

In the case [illegible] 206 111. 461, the [illegible] to warranted a [illegible] ence of the case [illegible] himself and [illegible] driven by the [illegible] it a question, in [illegible] the will [illegible] had to it, [illegible] reasonable and [illegible] crossing the [illegible]

So it has been held that a failure to look and listen, on the part of one riding with his back to the driver, while approaching a well known railroad crossing at a fast trot, or to warn the driver, or to take any precautions whatever, was contributory negligence barring recovery. In cases of this kind it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and avoid it if possible."

We therefore hold that Albert [illegible] Brown, Sr. father of defendant in error's intestate was not in the exercise of due care for the safety of his child and that by reason thereof defendant in error as the administrator is not entitled to recover and that this case should be reversed without remanding.

We find as an ultimate fact in this case that plaintiff in error was not guilty of the negligence charged in the declaration in this case and that Albert [illegible] Brown, Sr., father of defendant in error's intestate, an infant under six years of age, was not in the exercise of due care for the safety of his infant son for whose death this suit is brought, and that his negligence contributed directly to the injury and death of his said son.

Reversed with finding of fact.

Not to be reported in full.

do it has been held that a failure to look or listen,
on the part of one riding at the back of the train, while
approaching a well known railroad crossing [illegible] to warn the driver, or to take any [illegible] power,
was contributory negligence [illegible]
this kind it is no [illegible] has the opportunity to do so, [illegible]
of the danger and avoid it if possible.

We therefore [illegible] of defendant in error's [illegible]
due care for the safety of [illegible]
thereof defendant in error [illegible]
titled to recover and [illegible]
without remanding.

[illegible]
plaintiff in error [illegible]
in the decapitation in the [illegible]
father of defendant in error's [illegible]
six years of age, was not [illegible]
the safety of his [illegible]
brought, and there [illegible]
injury and death of [illegible]

[illegible]

Not to be reported [illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

52a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 643

Ralph McNew,
Appellee

vs.

No. 31
March Term, 1918.

Morris Sternberger,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

St. Clair COUNTY

TRIAL JUDGE

HON. J. F. GILLIHAM

Term No. 31 | In the Appellate Court of Illinois, Fourth District. March Term, A. D. 1918. | Agenda No.19

212 I.A. 643

Ralph McNew, Appellee vs. Morris Sternberger, Appellant	Appeal from Circuit Court St. Clair County, Illinois.

Opinion by Boggs, P. J.

Appellee brought suit against appellant before a Justice of the Peace of St. Clair County and on appeal to the Circuit Court of said County, recovered a verdict and judgment against appellant for $12.50. To reverse said judgment this appeal is prosecuted.

Appellee failed to file a brief in compliance with the rule 27 of the Court. Said judgment is therefore reversed and said cause remanded under the provisions of said rule.

Reversed and Remanded.

Not to be reported in full.

Term No. 31 In the Appellate Court

of Illinois, [illegible]

March Term, A. D. [illegible]

Ralph Mohew, Appellee

vs.

Morris Sternberger, Appellant

Opinion by Hogge, P. J.

Appellee brought suit [illegible]

Justice of the Peace of [illegible]

the Circuit Court of [illegible]

judgment against appellant for [illegible]

judgment this appeal [illegible]

Appellee filed [illegible]

the rule 27 of the Court. [illegible]

versed and said cause remanded [illegible]

rule.

Not to be reported in [illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

53a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 643

G. E. Rogers,
Appellee

vs.

No. 36
March Term, 1918.

Fox & Godding,
Appellants

~~ERROR TO~~
APPEAL FROM

County COURT

Washington COUNTY

TRIAL JUDGE

HON. W. P. GREEN

Term No. 36 | In the Appellate Court of Illinois, Fourth District. March Term, A. D. 1918. | Agenda No.13

212 I.A. 643

G. E. Rogers, Appellee

vs.

Jared W. Fox and Charles H. Godding, partners, doing a firm business under the name of Fox & Godding,

Appellants

Appeal from County Court Washington County.

Opinion by Boggs, P. J.

An action on the case brought by appellees against appellant in the County Court of Washington County resulted in a verdict and judgment for $307.80 in favor of appellee. To reverse said judgment this appeal is prosecuted. The declaration consists of three special counts and the common counts. The first special count avers that by a written contract dated August 18, 1915, appellee sold to appellant 600 barrels of apples of the following varieties, viz: 200 barrels of Jonathans; 200 barrels of Grimes Golden and 200 barrels of Winklers. Said apples to be free from worms, hailpeck, bruises, scab blotch or scale, and no wind fall apples, and were to be carefully picked. The price to be $2.25 f.o.b. Walnut Hill, Ill. $100.00 being paid on the execution of the contract. The other payments to be made on receipt of invoice and bill of lading.

The declaration avers the delivery of said apples and alleges there is still due thereon the sum of $300. The second count avers that after the execution of the above mentioned written contract appellant purchased from appellee at

Term No. 36 In the Appellate Court Agenda No.13

of Illinois, Fourth District.

March Term, A. D. 1918

G. M. Rogers, Appellee

vs.

Jared W. Fox and Charles L. Godding, partners, doing a firm business under the name of Fox & Godding,

Appellants

21 I.A. 643

Opinion by Page, J. . . .

An action of [illegible] appellant in the County Court of [illegible] in a verdict and judgment for [illegible] To reverse said judgment this [illegible] declaration consists of three [illegible] counts. The first special count [illegible] tract dated August 1, 191[illegible] barrels of apples [illegible] of Jonathans; 200 barrels [illegible] of Winklers. [illegible] bruises, such defects [illegible] were to be practically [illegible] Walnut Hill, Ill. [illegible] contract. The [illegible] voice and bill [illegible]

The declaration [illegible] and alleges that [illegible] second count [illegible] tioned written [illegible]

the same price upon the same terms all apples that appellee then had, to be delivered f.o.b. Walnut Hill and other points and avers that appellee delivered additional apples; that the same were accepted and that there remains unpaid for said apples the sum of $300. The third count avers that appellant by verbal agreement bought of appellee at the price of 40¢ per hundred weight f.o.b. cars at Walnut Hill and surrounding points all the apples appellee then had. The declaration further avers that bulk apples were delivered by appellee and accepted by appellant and that there remains due thereon the sum of $500.00.

The fourth count was the consolidated common counts. To said declaration a plea of the general issue was filed. A trial was had resulting as above set forth.

The principal ground relied on for a reversal of said judgment is that the verdict and judgment is against the manifest weight of the evidence. The contention of appellant being that no contract was made by them for the purchase of any apples other than the apples mentioned in the written contract, and that all other apples shipped by appellee to them were sold on commission and that they had rendered on account to appellee of such sales and had paid in full therefor, and that there was nothing owing at the time the suit was instituted. On the other hand appellee contends that after the making of the written contract he met the agent of appellants at or near Walnut Hill and verbally contracted with appellants for all of the apples of the character mentioned in the contract above set forth that appellee might purchase.

The evidence is conflicting with reference to whether such a contract was entered into. Appellee testified that such contract was made while two witnesses on behalf of appel-

the same price upon the same terms all apples [illegible]
then had, to be delivered f.o.b. [illegible]
and avers that apples delivered additional [illegible]
same were accepted and that there remained [illegible]
apples the sum of $[illegible]. The trial court avers [illegible]
by verbal agreement [illegible]
per hundred weight f.o.b. [illegible] shipping
points all the apples specified [illegible]
further avers that such apples were delivered [illegible]
and accepted by appellant and that [illegible]
the sum of $[illegible].

The fourth count was [illegible] counts.
To said declaration a plea [illegible]
trial was had resulting as above set forth.

The principal issues raised [illegible] and
judgment is that the verdict [illegible]
feet weight of the evidence. [illegible]
being that no contract was made [illegible]
any apples other than the apples [illegible]
contract, and that [illegible]
there were sold on commission [illegible]
account to appellee of such [illegible]
for, and that there was nothing [illegible]
was instructed. On [illegible]
after the rendition of the verdict [illegible]
appellants motion [illegible]
appellants for [illegible]
the contract [illegible]

The evidence [illegible]
such a contract [illegible]
such contract [illegible]

lants testified there was no such contract entered into. We think, however, that the facts and circumstances surrounding the case tend to support the contention of appellee for the reason the evidence in the record discloses appellants accepted and paid for something like one thousand barrels of apples from appellees at the price of $2.25 per barrel, being about 400 barrels in excess of the written contract. The evidence too on the part of appellee is to the effect that he had delivered to appellants 1598 barrels of apples whereas appellants insist that only 1453 barrels of appeles had been delivered to them, and they do not claim to have received or paid for any more. The copy of the bills of lading offered in evidence by appellee conclusively show that 1598 barrels of apples had been delivered on the cars billed to appellants. The jury were, therefore, warranted in finding that 145 barrels of apples had been delivered by appellee that had not been paid for by appellants. These apples at $2.25 per barrel would amount to $316.25 being in excess of the verdict and judgment in this case.

Appellants further contend that the statements rendered by them to appellee of apples received and sold by them on commission with a remittance for the balances owing to appellee on such sales tended to corroborate their contention that the shipments were shipments to be sold on commission and were not on contract. However that may be, as heretofore stated, something like 1000 barrels of apples were accepted by appellants and paid for at the purchase price of $2.25 per barrel. The evidence clearly shows that appellants were not relying exclusively on the written contract. Then, too, the evidence tends to show that they received

lants testified there was no [illegible]

We think, however, that the [illegible] -ing the case tend to support the contention [illegible] the reason the evidence in the [illegible] accepted and held for [illegible] of spirits from an office at [illegible] being about 400 barrels in excess of [illegible]

The evidence too on the part of [illegible] that he had delivered to [illegible] whereas appellants admit to only [illegible] had been delivered to [illegible] received or paid for any [illegible] lading offered in evidence by [illegible] that 1528 barrels of [illegible] billed to appellants. [illegible] finding the 1 [illegible] barrels [illegible] appellee that has not by [illegible] applies of [illegible] excess of the verdict [illegible]

Appellants further contend [illegible] rendered by them to [illegible] then on consignment [illegible] to appellee on [illegible] -tion that the [illegible] -ving [illegible] -tofore [illegible] recovered by [illegible] of [illegible] lants were [illegible] then, too, [illegible]

apples in excess of the amount that were paid for either by contract or as sales on commissions, so that so far as the evidence is concerned we are not able to say that the verdict of the jury is against its manifest ~~with~~ weight.

It is next contended by appellants that the court erred in giving the fourth and sixth instructions given on behalf of appellee. The principal criticism in regard to these instructions is that they submitted to the jury the question of whether the bulk apples sold by appellees to appellants were to be f.o.b. the cars. We have examined these instructions and do not find they are subject to the criticism made by appellants and we are unable to see how the giving of either of these instructions could prejudice the rights of appellants.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

[illegible]

[illegible] supplies in excess of the amount [illegible] for either by contract or as sales on conditions, [illegible] to [illegible] the evidence is concerned we are not [illegible] that [illegible] verdict of the jury is against the [illegible] with [illegible].

It is [illegible] contended by [illegible] that the court erred in giving the fourth and [illegible] instructions given on behalf of appellee. The [illegible] instructions in regard to these instructions is [illegible] by [illegible] the question of whether the [illegible] appellants were to be [illegible] these instructions and [illegible] to the criticism made by appellants [illegible] the giving of either of these instructions [illegible] the rights of the litigants.

Finding no reversible error [illegible] judgment of the trial court will be [illegible]

[illegible]

Not to be reported [illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*0.

Clerk of the Appellate Court

OPINION

FEE, $

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 643

Marion Weshinsky,
Appellee

vs.

No. 44
March Term, 1918.

Chicago-Sandoval Coal Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. W. B. WRIGHT

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the ~~foregoing~~ attached is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th day of December A. D. 1918.

Clerk of the Appellate Court

Term No. 44. In the Appellate Court Agenda No.16

of Illinois, Fourth District

March Term, A. D. 1918.

212 I.A. 643

Marion Weshinsky, Appellee vs. Chicago-Sandoval Coal Company, Appellant	Appeal from Circuit Court Marion County, Ill.

Opinion by Boggs, P. J.

An action on the case was instituted by Marion Weshinsky, appellee, against appellant, Chicago-Sandoval Coal Company, in the Circuit Court of Marion County, to recover damages for personal injuries received by him while employed as a coal miner in appellant's mine. The declaration consists of three counts. The first two counts aver that there was a squeeze in the room in which appellee was working, cause the slate and other material to fall and injure him. The third count alleges among other things "that the working place of plaintiff in said room where the said plaintiff was then and there required to work and to be in the performance of his duties as a miner, as aforesaid, was in a dangerous and unsafe condition, in this: that at said working place in said room in said mine there then existed a squeeze in said mine, by reason of which coal, slate, rock, dirt, debris and other material then and there at said working place was likely to fall in great quantities upon the said plaintiff and others who might be working there and thereby endangering the lives and safety of the said plaintiff and

Term No. 44. In the Appellate Court Agenda No.16
of Illinois, Fourth District
March Term, A. D. 1918.

Marion Weshinsky, Appellee	21214. 543
vs.	Appeal from the Circuit Court
Chicago-Vandovani Coal	Marion County, Ill.
Company, Appellant	

Opinion by Boggs, J. P.

An action on the case was instituted in Marion Weshinsky, appellee, against appellant, Chicago-Vandovani Coal Company, in the circuit court of Marion County, to recover damages for personal injuries received by him while employed as a coal miner in appellant's mine. The declaration consists of three counts. In the first count it is alleged that there was a squeeze in the room in which appellee was working, cause the slide and other [illegible] and injure him. The third count charges [illegible] the working place of plaintiff in said room [illegible] plaintiff was then and there [illegible] the performance of his duties as a [illegible] a dangerous and unsafe condition, in [illegible] working place in said room [illegible]

[illegible] by reason of said [illegible] dirt, debris and other [illegible] the place was likely to fall at any [illegible] plaintiff and others who might be [illegible] endangering the life and safety of [illegible]

Clerk of the Appellate Court for the Fourth District of Illinois
I, the undersigned, do hereby certify that the above and foregoing is a true and complete copy of the OPINION of the Appellate Court in the above entitled cause, as the same appears of record and on file in my office
Given under my hand and affixed the seal of said Court this 19th day of December A.D. 1918
Clerk of the Appellate Court

other servants and employees of the defendant who were obliged to work and be in said working place in said room. All of which was then and there well known to the defendant."

All three of said counts charged it to be the duty of the appellant to have its mine examiner inspect and examine said working place and to inscribe on the walls the month and day of the month of said visits, and to place a conspicuous mark or sign at the working place if any recent falls or dangerous roof or other dangerous condition were discovered, and further to make a daily report of his examination before appellee and others were permitted to enter the mine. It was further alleged to be the duty of the mine manager to take possession of the entrance checks, etc. where a working place was shown to be dangerous. Said declaration alleges a willful violation of the provisions above mentioned, and that as the result of such violation appellee while at work in his working place was caught and crushed between a mass of rock, slate, debris and other material which fell upon him, whereby he was injured, alleging damages, etc. Each of said counts aver that appellant had rejected the Workmen's Compensation Act

To said declaration appellant filed a plea of the general issue. A trial was had resulting in a verdict and judgment in favor of appellee for $3500. To reverse said judgment this appeal is prosecuted.

The principal ground relied upon by appellant for a reversal of the judgment in this case is that the verdict of the jury is against the manifest weight of the evidence. The record discloses that appellee was sixty three years of age at the time of his injury; and that he was a practical miner of some years experience; that on June 10, 1916, being Saturday, appellee had prepared a shot in the face of the

other servants and employees of the defendant was to assign
to work and be in said working place in said [illegible] of which
was then and there well known to the defendant.

All times of said [illegible] day
of the appellant to have [illegible] of estate
said working place and to [illegible]
day of the month of said [illegible]
mark or sign at the working place [illegible]
serious roof or other [illegible]
and further to [illegible]
appliances and [illegible]
further alleged to be the duty of [illegible]
possession of the [illegible]
was shown to be [illegible]
violation of the [illegible]
result [illegible]
the place [illegible]
state, [illegible]
he was injured, [illegible]
ever that appellant [illegible]
[illegible]
general [illegible]
judgment in favor [illegible]
judgment [illegible]
[illegible]
a reversal of the [illegible]
of the [illegible]
the record [illegible]
[illegible]
minor of [illegible]
[illegible]

coal near the right rib about three feet from the bottom, which was fired by a shot firer. Appellee returned to said room on the following Monday about eight o'clock in the morning and began to shovel coal that had been shot down. He loaded two loads of coal and a part of the third when he was struck on the back by coal or slate, was thrown to the ground and left in an unconscious condition, receiving the injuries complained of. Appellee was working alone at the time of the injury. When found he was sitting on a lump of coal with coal or slate scattered all around him, one piece of slate weighing about 100 pounds. The vein of coal at this point was about six or six and one half feet thick and there was something like two feet of slate at the top of the room.

The record discloses that there was a slip in the slate five or six feet back from the face near the right hand rib; and that there was a parting in the slate, it being torn out to a feather edge at the bottom and ran up through the entire thickness of the same. Appellee was working about two feet from the right hand rib and four or five feet from the face at the time of the injury. On the morning in question there were no marks indicating danger in appellee's working place and his entrance check had not been taken up by the mine manager and nothing had been done to indicate that a dangerous condition existed in said room.

Whether or not there was a dangerous condition existing in the room where appellee was working on the day in question was a question of fact for the jury under the evidence in this case and unless we are able to say that the verdict is against the manifest weight of the evidence, we should not disturb the judgment on that ground. Masterlik v. Strong 107 App.347; Chicago & J.E.R.Co.v.Patton, 122 App.174;

coal near the right [illegible]
which was fired by a shot firer. [illegible]
from on the following Monday [illegible]
morning, and began to shovel coal [illegible]
He loaded two loads of coal [illegible]
he was struck on the back by coal [illegible]
the ground and left in [illegible]
the injuries [illegible]
the time of the injury [illegible]
of coal with coal or slate on the [illegible]
or white washing [illegible]
point was about six or six [illegible]
was something like two feet [illegible]
the roofs directly [illegible]
slate five or six feet back [illegible]
rib and that it was [illegible]
out to a larger [illegible]
entire [illegible]
two feet from [illegible]
the face of the [illegible]
tion here was [illegible]
working face and [illegible]
by the time [illegible]
that [illegible]
[illegible]
letter in the room where [illegible]
question was a question [illegible]
dence in the [illegible]
verdict [illegible]
should not direct the [illegible]
Stone 107 N.E.34; [illegible]

Chicago City Ry. Co. v. Iverson, 108 App.433.

The record discloses that a layer of slate two feet in thickness overlaid said vein of coal which frequently became loosened. In this slate there was a fault or slip and it was at this point that the chunk of slate above mentioned became loose and fell. The witness Day on behalf of appellee testified; "The slate at that place was something like two feet thick, I think; there was quite a bit of coal on the floor of the room where the old gentleman was, and one piece of slate, not very much slate; I expect that piece of slate would weigh 100 pounds likely. I could tell where that piece of slate come from; it come from the top; I could see the place." This witness further testified on cross examination, "I suppose there was about a ton of coal down from the face; I could see it had fallen from the shot; it fell from the shot and the rib together; the shot and the top of the shot along the rib, and I think there was one piece of slate there, there wasn't much slate; one big piece."

Dudley Nave, another witness on behalf of appellee testified with reference to the slate in the roof and the slip above mentioned. No testimony was offered by appellant. An examination of the record satisfies us that the jury were warranted in finding that a dangerous condition existed in the room where appellee was working, both on account of the slip in the slate, and also on account of the condition of the coal at the face. The record discloses that when the shot was fired the whole of the coal that should have come down did not break loose and fall, and that while appellee was at work shoveling up this coal the remainder of the coal at the face that his shot should have brought down, together with

Chicago city ry. Co. v. [illegible]

The reports indicate that [illegible]

in thickness [illegible]

came loosened. [illegible]

it was at this point [illegible]

became [illegible]

testified: "The [illegible]

feet high, I think [illegible]

floor [illegible]

of air, not [illegible]

would [illegible]

of [illegible]

place." [illegible]

"I [illegible]

I did [illegible]

and the air [illegible]

the air, and [illegible]

wasn't [illegible]

[illegible]

testified with [illegible]

also confirmed. [illegible]

examination [illegible]

were [illegible]

the [illegible]

air in [illegible]

the [illegible]

was [illegible]

[illegible]

[illegible]

[illegible]

this piece of slate from the roof, fell and appellee was injured. It is contended by appellant that the record does not disclose how appellee received his injury. No one saw the injury occur and while appellee was rendered unconscious from the injury and was not able to tell just what had occurred at the time he was struck, still we think the facts and circumstances surrounding the injury were amply sufficient for the jury to draw the conclusion that appellee was injured by reason of the fall of slate from the roof or from the fall of the coal at the face or both, and that either the condition of the coal at the face or condition of the slate in the roof were sufficient to constitute a dangerous condition and should have been marked by the mine examiner.

The record discloses that the mine examiner was in the mine on the 11th of June but according to his own testimony his examination was not very thorough as he testified that he had something over 200 rooms to examine and that he could not give much time to any particular place. The record discloses that appellant had elected not to be governed by and pay compensation under the Workmen's Compensation Act, and, therefore, the defense of assumed risk, fellow servant and contributory negligence are not available to appellant. If the jury were warranted in finding that the appellant was negligent as charged in appellee's declaration or some count thereof, and that as the proximate result of said negligence appelleereceived the injury complained of, the court should not disturb the verdict.

It is further contended by appellant that the injury received by appellee was caused by appellee shoveling from under the face of the coal where the shot had been fired and that the falling of the coal was occasioned by the act of

this piece of slate from the roof, fell and [illegible] injured. It is contended by appellant that [illegible] not disclose how specific received its injury [illegible] the injury occur and while [illegible] from the injury and was not able to tell [illegible] occurred at the time [illegible] circumstance surrounding the injury [illegible] the jury to draw the conclusion [illegible] injured by reason of the fall of slate [illegible] of the coal at the face or [illegible] of the coal at the face or [illegible] were sufficient [illegible] have been struck by the mine [illegible]

The record discloses [illegible] the mine on the 11th [illegible] many his examination [illegible] that he [illegible] could not give such [illegible] disclosed that [illegible] and was [illegible] and, therefore, [illegible] and contributory [illegible] If the jury were [illegible] negligence [illegible] thereof, and that [illegible] appellee [illegible] not injure [illegible]

[illegible] recovered by [illegible] under the [illegible] and that the [illegible]

appellee. There is no evidence in the record to support this contention. It is further contended by appellant that the condition of the face of the coal does not create a dangerous condition requiring the same to be marked. We do not think the position of appellant well taken. Our Supreme Court has held to the contrary in Dunham v. Black Diamond Coal Co. 239 Ill.457 and Mengelkamp v. Consolidated Coal Co. 259 Ill.305.

In Mengelkamp v. Consolidated Coal Co. supra, the Supreme Court at page 309 says: "It is contended that the mine examiner is not required to examine the track because the hazards arising from its defective condition are not peculiar to mining but are such as are common to any other occupations, and further, because the examination the examiner is required to take as to his qualifications require no knowledge of anything concerning the building or maintenance of railway tracks in mines. We have held that the words 'any dangerous conditions' in the Mining Act, apply to dangerous conditions in the track, the road-bed or the sides of the entries, and that they include any dangerous conditions which may exist in a coal mine which endanger the life, limb or health of men working in the mine, whether such conditions are of a permanent character, due to the faulty construction, or of a temporary character, due to operation. (Mertens v. Southern Coal Co. 235 Ill.540; Dunham v. Black Diamond Coal Co. 239 Ill.457.) In the latter case the presence of a live, uninsulated electric wire in an entry, with which a driver or mule might come in contact, was regarded as a dangerous condition which it was the duty of the mine examiner to discover and report."

appellee. There is no evidence in the record to support this contention. It is further contended by appellee that the condition of the face of the coal [illegible] dangerous condition requiring [illegible] to [illegible]. We do not think the position of appellee [illegible] Supreme Court has held to the contrary [illegible] Coal Co. 239 Ill.457 and [illegible] 239 Ill.Rep.

In Kempelkamp v. Compagnie [illegible], the Supreme Court at page 329 [illegible] the trial court's finding that the mine examiner is not required to [illegible] hazards arising from the defective [illegible] to mining but such as are [illegible] and further, because the [illegible] to take as to the qualifications [illegible] anything concerning [illegible] trucks in [illegible] conditions' in the [illegible] in the trucks, the [illegible] that they include any [illegible] in a coal mine [illegible] men working in the [illegible] permanent character, due to [illegible] temporary character. [illegible] Coal Co. 245 Ill.[illegible] Ill.457.) In the [illegible] insulated electric wire [illegible] might [illegible] tion [illegible] report."

It is next contended by appellant that the court erred in refusing to give the third refused instruction tendered by appellant. We have examined this instruction and do not believe the court erred in refusing the same for the reason that said instruction assumes certain conditions which were controverted in the case and which the evidence did not support.

Eight instructions were given on behalf of appellant. An examination of these instructions disclose that the jury were instructed fully on every phase of appellant's case and properly presented its theory.

No complaint is made that the verdict of the jury was excessive. The record discloses that appellee is partially paralized and that this condition is permanent and the evidence tends to show that instead of growing better, the condition of appellee will probably grow worse as the injury received by him is of a character to render him nervous as well as to render him in a degree helpless.

Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

It is next contended by appellant that the court erred in refusing to give the third refused instruction tendered by appellant. We have examined this instruction and do not believe the court erred in refusing it, for the reason that said instruction assumes certain [illegible] which were controverted in the case and which the evidence did not support.

[illegible] instructions are [illegible] appellant, an exception to these instructions [illegible] the jury were instructed fully on every phase of the [illegible] case and properly presented its theory.

No complaint is made that the [illegible] the jury was excessive. The record discloses [illegible] war-tially matured and that this [illegible] and the evidence tends to show that [illegible] the condition of [illegible] injury [illegible] your [illegible] to verdict. [illegible]

[illegible] ment [illegible] [illegible]

[illegible]

Not to be reported in full.

OPINION

FEE, $ .....

55a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 643

Tony Repsis,
Appellee

vs.

No. 53
March Term, 1918.

SalineCounty Coal Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 53 | In the Appellate Court of Illinois, Fourth District, March Term A. D. 1918. | Agenda No.49

212 I.A. 343

Tony Repsis, Appellee vs. Saline County Coal Company, a Corporation, Appellant	Appeal from Circuit Court Saline County, Illinois.

Opinion by Boggs, P. J.

An action on the case brought in the Circuit Court of Saline County by appellee against appellant for personal injuries sustained by appellee from the falling of rock from the roof of appellant's mine in which appellee was employed as a miner, resulted in a verdict and judgment in favor of appellee for $1500.00.

The declaration consists of three counts, all of which allege a rejection of the Workmen's Compensation Act. The first count charges that in the room where appellee and his buddy were working there was a large piece of loose rock and slate which was likely to fall and then and there constituted a dangerous condition in said room; that said rock had been in such loosened condition for to-wit: three days, and that said dangerous condition could have been discovered by the mine examiner by making a reasonably careful examination of said room. Said count further charges that the mine examiner for appellant made an examination of said room and discovered said loose rock and slate constituting said dangerous condition and that appellant wilfully failed to cause its mine examiner to place a conspicuous mark thereon as

Term No. 35 | In the Appellate Court | Agenda No. 49
of Illinois, Fourth District,
March Term A. D. 1912.

Tony Nepsie, Appellee	**212 I.A. 643**
vs.	Appeal from Circuit Court
Saline County Coal Company, a Corporation, Appellant	Saline County, Illinois.

Opinion by Boggs, P. J.

An action on the case brought in the Circuit Court of Saline County by appellee against appellant for personal injuries sustained by appellee from the falling of rock from the roof of appellant's mine in which appellee was employed as a miner, resulted in a verdict and judgment in favor of appellee for $[illegible].

The declaration consists of three counts, [illegible] which allege a violation of the "[illegible]" [illegible]. The first count charges that in the room where appellee and his buddy were working there was a large [illegible] rock and slate which was likely to fall [illegible] constituted a dangerous condition in the room [illegible] had been in such condition for a long time [illegible], and that said dangerous condition [illegible] by the mine examiner by making a [illegible] examination of said room. The count further [illegible] examiner for appellant made an examination [illegible] discovered and knew that one slate [illegible] and dangerous condition and that appellant [illegible] its mine examiner to place a [illegible]

provided by statute.

The second count charges that there was a large piece of loose rock and slate situated in the room where appellee was working and that the same constituted a dangerous condition and that said dangerous condition could have been discovered by the mine examiner by making a reasonably careful examination of said room, and alleges the duty of the mine examiner to place a conspicuous mark thereon and his failure so to do, etc.

The third count was a common law count charging the failure of appellant to provide appellee with a reasonably safe place to work.

To this declaration a plea of the general issue was filed, a trial was had, resulting in a verdict and judgment as above set forth.

The record discloses that appellee was 34 years of age and had had about 7 years experience as a miner; that on January 11, 1915, the date of the injury, he was working in room number one off the second west entry off the eighth northwest stub entry of appellant's Mine No. 2, at Leford, Illinois. Said room had been driven a distance of about forty feet. The vein of coal in said entry was ~~xxxxx~~ only about four and one half feet thick. The record further discloses that tracks were laid in this room and that by reason of the shallow vein of coal it wasnecessary to blow down a part of the mine roof in order to give room to load the cars,-the cars being about four feet in height. The record shows this roof to have been of solid rock. On Saturday, January 9, appellee andhis buddy drilled three holes about five and one half feet deep in the face of the coal and one hole two feet deep in the rock over the track, and loaded

provided by statute.

The second count charges that there was a large piece of loose rock and slate situated in the room where appellee was working and that the same constituted a dangerous condition and that said dangerous condition could have been discovered by the mine examiner by making a reasonably careful examination of said room, and alleges the duty of the mine examiner to place a conspicuous mark thereon and his failure so to do, etc.

The third count was a common law count charging the failure of appellant to provide appellee with a reasonably safe place to work.

To this declaration a plea of the general issue was filed, a trial was had, resulting in a verdict and judgment as above set forth.

The record discloses that appellee was [illegible] years of age and had had about 7 years experience [illegible] on January 11, 1915, the date of the injury, in the working in room number one off the second west entry off the [illegible] northwest slope entry of appellant's mine [illegible], Illinois. Said room had been driven a distance of about forty feet. [illegible] of coal in [illegible] was only about four and one half feet thick. [illegible] disclose that there were lying in this [illegible] of the smaller vein [illegible] down a part of the mine roof in order to [illegible] over,-the core lying about [illegible]. The record shows this roof to have been of solid rock [illegible] January 4, appellee [illegible] about five and one half feet deep in the [illegible] and one hole two feet deep in the rock over [illegible] loaded

the same with explosives. Said shots were fired by them about four o'clock that afternoon. The mine examiner visited this room about one o'clock A. M. on January 10, and inspected the same and made report to the company in a book kept for that purpose, that the condition therein was safe. Appellee and his buddy returned to work in this room at 7:30 on the morning of January 11, and began loading coal. The mine examiner left no mark indicating a dangerous condition and appellee was given his entrance check. After loading a car and removing some loose rock appellee and his buddy discovered a crack in the roof of their working room and tried to get the rock down but without success. They then placed a prop thereunder and began to load coal. About two P. M. a large rock fell upon appellee, breaking his leg and causing the injury complained of.

Appellant having rejected the provisions of the Workmen's Compensation act is precluded from offering the defenses of contributory negligence, assumed risk and fellow servant. Appellee, however, has the burden of proving the negligence of appellant as charged in the declaration by a preponderance of the evidence. At the close of appellee's evidence and again at the close of all the evidence, appellant moved the court for a directed verdict, which motion was denied. It is now contended by appellant that the court erred in its ruling on said motions. Without going into a discussion of the evidence in the record it is sufficient to say that the evidence in the record with the inferences reasonably to be drawn therefrom fairly tend to prove the allegations of appellee's declaration, and the court therefore did not err in refusing to direct a verdict.

It is next contended by appellant that the court

the same with explosives. [illegible]
four o'clock that afternoon. [illegible]
room about two o'clock A.M. [illegible]
same and made report to [illegible]
purpose, but [illegible]
his body returned [illegible]
ing or January 11, [illegible]
left no rock [illegible]
was given [illegible]
moving [illegible]
crack in the roof [illegible]
rock room [illegible]
under and [illegible]
fell upon [illegible]
completed it.

[illegible]
workmen's [illegible]
fences or [illegible]
servant. [illegible]
negligence [illegible]
preparation [illegible]
evidence [illegible]
moved the [illegible]
denied. [illegible]
in his [illegible]
sion of the [illegible]
that the [illegible]
to be [illegible]
superior's [illegible]
in refusing [illegible]

erred in its rulings on the instructions. Instruction No.7 given on behalf of appellee is as follows: "You are further instructed that if you believe from a preponderance of the evidence that the working place of the plaintiff was in fact dangerous in the particular charged in the declaration, eight hours before the time the men were permitted to enter the mine to work therein, then it was the further duty of the defendant company to have caused its mine examiner to have taken up the entrance check of the plaintiff and to have given the same to the mine manager, and to have caused its mine manager to have withheld the plaintiff's entrance check from him, and to have prevented the plaintiff from entering his working place on said day to work therein, except for the purpose of making the same safe, and, if you find from a preponderance of the evidence that the defendant willfully failed toperform its duty in this regard, then your verdict must be for the plaintiff." This instruction is practically a copy of an instruction given in the case of Smith vs. Saline County Coal Company, heard by this Court at the October Term, 1917, the opinion having been filed on the 5th day of April 1918. After setting out the instruction complained of in full we there said: "The vice of this instruction is that it directs the jury to return a verdict for appellee, if the preponderance of the evidence showed appellant had violated its statutory duty but failed to require that appellee's injury should have been the result of appellant's said neglect of its statutory duty. It is a fundamental principle of law relating to actions for personal injuries that the injuries complained of must be the natural and proximate consequence of the negligence charged. This instruction entirely omits the essential qualification that the evidence must show that

erred in its rulings on the instructions. Instruction No.7 given on behalf of appellee is as follows: "You are further instructed that if you believe from a preponderance of the evidence that the working place of the plaintiff was in fact dangerous in the particulars charged in the declaration, eight hours before the time the men were permitted to enter the mine to work therein, then it was the further duty of the defendant company to have caused the mine examiner to have taken up the entrance check of the plaintiff and to have given the same to the mine manager, and to have caused the mine manager to have withheld the plaintiff's returning check from him, and to have prevented the plaintiff from entering his working place on said day to work therein, except for the purpose of making the same safe, and, if you find from a preponderance of the evidence that the defendant wilfully failed to perform its duty in this regard, then your verdict must be for the plaintiff." This instruction is practically a copy of an instruction given in the case of [illegible] vs. [illegible] County Coal Company, heard by this court at its October term, 1917, the opinion having been filed on the [illegible] of April 1918. After stating the instruction complained of in full, we there said: "[illegible] of mere [illegible] it directs the jury to [illegible] verdict [illegible] the preponderance of the evidence showed [illegible] the statutory duty [illegible] failed to [illegible] injury should have [illegible] result [illegible] neglect of its statutory duty. [illegible] relating to certain [illegible] complained of [illegible] of the negligence charged [illegible] the essential qualifications [illegible]

such failure on the part of appellant to perform its statutory duty, contributed to appellee's injury, to entitle him to recover and the giving of it was reversible error. (Hurst v. Madison Coal Corporation, 201 Ill. App.205; C.& N.W.Ry. Co. v. Carroll 12 Ill.App.643.)"

This instruction directs a verdict and under the holding of this court in the above mentioned case the giving of the same is reversible error. Complaint is also made of the giving of the sixth, eighth, twelfth, and thirteenth instructions given on behalf of appellee. We have examined the sixth instruction and do not believe that it is subject to the criticism made against it and the court did not err in its ruling thereon.

The principal complaint made as to instructions eight and twelve is that they do not require that the jury shall make the finding required to be made therein from a preponderance of the evidence. Taking the instructions as a series we do not believe the failure of these instructions to contain the word "preponderance" would constitute reversible error. There are other instructions in the series that specifically require that the proof must be made by a preponderance of the evidence. However, as this case will have to be tried again it would be well that the word "preponderance" be inserted in said instructions before giving them to the jury. Other objections were made as to instruction eight, but we do not think they are well taken.

Instruction number thirteen informs the jury that if they find for appellee, in fixing the measure of damages they may take into consideration, among other things, the amount expended by appellee for medical attention and nursing.

such failure on the part of an effort to negative the statutory duty, contributed to unnecessary injury, in spite of his to recover and the giving of it was reversible error. (Street v. Madison Gas Company, [illegible] Co. v. Carroll [illegible]."

The instruction [illegible] under the holding of this court in the [illegible] of the giving of the reversible error [illegible] of the giving or the omission, [illegible] instructions given on behalf of the plaintiff [illegible] the essential the which instruction [illegible] to the criticism made against it [illegible] in it [illegible].

The principal complaint [illegible] eight and twelve is that they [illegible] the jury shall make the finding required [illegible] preponderance of the evidence. [illegible] a series of [illegible] to contain the word "preponderance" [illegible] mills [illegible]. There [illegible] specifically [illegible] preponderance of the evidence. [illegible] to be filled which [illegible] preponderance be [illegible] in the jury. [illegible] right, [illegible]

In instruction [illegible] it [illegible] they may [illegible] amount expended by [illegible]

The record fails to disclose that he expended anything for medical services or for nursing. Appellee testified as to the amount of the doctor and hospital bills, but states that he did not pay the doctor bill and failed to state he paid the hospital bill. An examination of the declaration discloses that no claim for medical expenses, or hospital expenses not paid by appellee, is made under the pleadings therefore no recovery for said expenses can be had.

In Winton v. Kuhlman, 201 Ill. App. 177, the appellant court of the Third District held that an instruction permitting a recovery for the amount of physician's bills which plaintiff had not paid but which he had become liable for is erroneous where the declaration contained no allegation that the plaintiff became liable for any such bills. In so far as said instruction allows a recovery for physician bills and nursing and hospital expenses, the same was erroneous.

It is also contended by appellant that the court erred in refusing to give the second, third, fourth, fifth and sixth of appellant's refused instructions. No particular reason why they should have been given were pointed out. We have examined the same and from the observations that we have made we do not find that the court committed any serious error in refusing these instructions. The court on behalf of appellant gave to the jury fifteen instructions and we are of the opinion that these instructions fairly presented appellant's case to the jury.

It is also contended by appellant that the court erred in allowing certain hypothetical questions to be asked and answered on behalf of appellee. The criticism

The record fails to disclose that he expended anything for medical services or for nursing. [illegible] testified as to the amount of the doctor and [illegible] bills, but stated that he did not pay the doctor bill and failed to state he paid the hospital bill. An examination of the record [illegible] discloses that no claim for medical expenses, or hospital expenses not paid by appellee, is made [illegible] there[illegible] no recovery for said expenses [illegible].

In [illegible] v. [illegible], [illegible] Ill. App. 177, the appellant court of the Third District [illegible] an instruction permitting a recovery for the amount of physician's bills which plaintiff had not paid [illegible] had become liable for is erroneous where the [illegible] count [illegible] no allegation that the plaintiff became liable for any such bills. In so far as said [illegible] allows a recovery for physician bills and nursing [illegible] the same was erroneous.

It is also contended by [illegible] that the court erred in refusing to give the second, [illegible], [illegible], fifth and sixth of appellant's refused [illegible] [illegible] particular reason why they should [illegible] out. We have examined the [illegible] that we have [illegible] to [illegible] by serious error in refusing [illegible] of appellant's [illegible] are of the opinion [illegible]

[illegible] court erred in [illegible] asked and answered [illegible]

seems to be, not that expert testimony is not proper in this character of cases, but that these questions failed to include all of the facts disclosed by the evidence and includes some facts not covered by the evidence. As a general rule parties offering expert testimony have the right to frame their questions on the theory of the evidence held by them. We have examined the record in reference to the objections made and do not find that the court committed any serious error in its ruling on the expert testimony.

For the giving of the seventh and thirteenth instructions, given on behalf of appellee, this cause is reversed and remanded.

Reversed and remanded.

Not to be reported in full.

seems to be, not that expert testimony is of proper in this character of cases, but that some questions failed to include all of the facts disclosed by the evidence and some facts not covered by the evidence. [illegible] tive officer, expert testimony [illegible] to frame their questions on the theory of the [illegible] have examined the record in [illegible] and do not find that [illegible] in its ruling on the expert testimony.

[illegible] the giving of the requested [illegible] instructions, given on behalf of [illegible], [illegible] reversed and remanded.

[illegible]

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

56a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 644

W. J. Simer, Admr.,
Appellee

vs.

No. 54
March Term, 1918.

Earl J. Hults,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Marion COUNTY

TRIAL JUDGE

HON. W. B. WRIGHT

Term No. 54 In the Appellate Court Agenda No.43

of Illinois, Fourth District.

March Term A. D. 1918.

212 I.A. 644

W. J. Simer, Administrator of the estate of Charles Simer, Deceased, Appellee

vs.

Earl J. Hults, Appellant

Appeal from Circuit Court Marion County, Ill.

Opinion by Boggs, P. J.

An action of replevin brought by W. J. Simer, administrator of the estate of Charles W. Simer, deceased in the Circuit Court of Marion County, against Earl Hults resulted in a verdict and judgment against appellant for property levied on and for $400.00 for value of property not found. To reverse said judgment appellant prosecutes this appeal.

It is first contended by appellant that the verdict is against the manifest weight of the evidence. It is the contention of appellant that he, purchased from Charles W. Simer, appellee's intestate, the property in dispute, consisting of live stock, farming tools, hay and grain. Appellant an unmarried man lived with the deceased, who was his brother-in-law, both farming and working together. Appellant sought to establish his ownership of the property by showing that from time to time deceased had borrowed different sums of money from him; that on July 16, 1910, the total amount of this indebtedness amounted to $1850. and that a note was then given by deceased to appellant therefor; that afterwards deceased borrowed some $235. which with $100. owing to ap-

Term No. 54 In the Appellate Court Agenda No.42

of Illinois, Fourth District.

March Term A. D. 1911.

2121 A. 644

W. J. Sumer, Administrator
of the estate of
Charles Sumer, Deceased, Appellee

vs.

Earl J. Hulse, Appellant

Appeal from Circuit Court
Ford County, Ill.

Opinion by Dodge, P. J.

An action of replevin brought by W. J. Sumer, administrator of the estate of Charles Sumer, deceased in the Circuit Court of Ford County, against Earl Hulse resulted in a verdict and judgment against appellant for property levied on and for $[illegible] for value [illegible] not found. To reverse said judgment appellant prosecutes this appeal.

It is first contended by appellant that the verdict is against the manifest weight of the evidence. [illegible] the contention of appellant that Mr. [illegible] Sumer, a bachelor two, the [illegible] operating of the crew, [illegible] lant on unmarried man lived with the [illegible] brother-in-law, both farming and [illegible] sought to establish the ownership [illegible] that from time to time [illegible] of money from [illegible] that on July 1[illegible] this indebtedness amounted to $[illegible] [illegible] given by deceased to appellant [illegible] deceased borrowed some $30. [illegible]

pellant for labor amounted to $335.00 and that deceased executed a note therefor, giving his wife and father as sureties thereon; that in the fall of 1911, after the larger note was due, deceased sold and transferred the property in question to appellant and in payment therefor, appellant delivered up the note for $1850.00; that thereafter and until the death of Mr. Simer, appellant lived with him and held possession of the property on the premises. The property in dispute was not inventoried by the administrator, nor did it appear to have been claimed by him as part of the estate of said deceased until about the time this suit was brought. Appellant attempted to prove the existence of the $1850.00 note by the testimony of a brother and the latter's wife, to the effect that a note for that amount, signed by the deceased, payable to appellant, was left by appellant in their possession in 1911, and that afterwards, during the lifetime of Simer, appellant got the note and delivered it to said deceased in settlement for the property in question. On the other hand appellee, the father of said deceased insists that no sale or trade was made by said deceased with appellant by which the title to said property passed to appellant, that said deceased was the owner of said property prior to and at the time of his death and that said property was in the possession and control of said deceased continuously from the time when he acquired the same up until his death. Each of said parties offered evidence tending to support their respective contentions. There was a sharp conflict in the evidence. Two juries have found the issues of fact in favor of appellee and we are not able to say that the verdict in this case is against the weight of the evidence.

Appellant next complains of instruction No. one, given

pellant for labor amounted to $[illegible] and that deceased exe-
cuted a note therefor, giving his wife and father as sureties
thereon; that in the fall of 1911, [illegible] due, deceased sold and transferred the property in question
to appellant and in payment therefor, [illegible] delivered to
the note for $[illegible]; that thereafter and until the death of
Mr. Sisner, appellant lived with him and [illegible] possession of
the property on the premises. The property in [illegible] was
not inventoried by the administrator, [illegible] to
have been claimed by him as part of the estate [illegible] deceased
until about the time this suit was brought. [illegible] at-
tempted to prove the existence of the note [illegible] by the
testimony of a brother and the letters wife, to the effect
that a note for that amount, signed by the deceased, payable
to appellant, was left by appellant in their [illegible] in
1911, and that it [illegible], during the [illegible] later, ap-
pellant got the note and [illegible] it to [illegible] and in
settlement for the property in question. [illegible] appellee, the brother of said deceased, [illegible] no sale or
trade was made by said deceased with appellant [illegible] the
title to said property passed to appellant, [illegible] said de-
ceased was the owner of said property [illegible] of the time
of his death and that said property was [illegible] and
control of said deceased [illegible] to
acquired the same [illegible] appellee
offered evidence tending to [illegible] the
tions. There was a [illegible] conflict in [illegible] the
jury have found the issues [illegible] we
are not able to say that the verdict [illegible], about
the weight of the evidence.

Appellant [illegible] given

for appellee, it being insisted that this instruction is in substance the same instruction which was before this Court on a previous hearing and will be found in 194 Illinois Appellate, 240. There is a material difference between the instruction on the former hearing and the one before us at this time. On the former hearing the instruction given in effect told the jury that if Charles W. Simer, the appellee's intestate, had the property in question in his possession at the time of his death, then such possession is prima facie evidence of the title of the property in Charles W. Simer at the time of his death, etc. The instruction in the present case is that if the jury find from the evidence that Charles W. Simer in his life time had become or was the owner of the property in question and continued to be the owner and in possession of said property up to the time of his death, such continued possession and ownership was prima facie evidence of the title to the property. This instruction did not direct a verdict and the court did not err in giving the same. Gilbert v. National Register Co. 176 Ill.288; Peters v. Smith, 42 Ill. 415; Lowney v. Arnold, 97 Appellate, 91; Comer v. Comer, 120 Ill.420. Appellant's theory of the case on this point was thoroughly presented to the jury by his instruction No. Seven which was given by the court. The jury was fully advised on this phase of the law by the two instructions.

It is further contended by appellant that the court erred in refusing the first, second and third of appellant's refused instructions. We have examined these instructions and are of the opinion that so far as applicable to the issues in this case they are substantially covered by the instructions given on appellant's behalf. The court did not err in refusing said instructions.

for appellee, it being insisted that this instruction is in substance the same instruction which was given [illegible] on a previous hearing and will be found in 104 [illegible] 240. There is a material difference between the instruction on the former hearing and the one before us at this time. In the former hearing the instruction given in effect told the jury that if Charles W. Oliver, the [illegible], in the property in question in [illegible] at the time of his death, then such possession is prima facie evidence of the title of the property in Charles [illegible] at the time of his death, etc. The instruction in the present case is that if the jury find from the evidence that [illegible] in his life time had become or was the owner of the property in question and continued to be the owner [illegible] ion of said property up to the time of his death, such continued possession and ownership was prima facie evidence of the title to the property. [illegible] instruction [illegible] and the court did not err in giving the same. Gilbert v. National Lumber Co. 176 Ill. [illegible] 111; Dorsey v. Kingsley, 27 [illegible] 1[illegible] 111.[illegible]. [illegible] thoroughly presented to the jury by the instructions [illegible] which were given by the court. [illegible] on the issue of [illegible] by the two [illegible]

It is further [illegible] the court erred in reading the first, second [illegible] refused instructions. [illegible] and are of the opinion that [illegible] in this case they are sufficiently covered by the instructions given on appellant's behalf. [illegible] ing and instructions.

Complaint is also made of the Court's refusal to permit a bill of exceptions showing the testimony of a deceased witness taken at a previous hearing of this cause. Such evidence may be proven by any person who may have heard and remembers the evidence, but a bill of exceptions is not admissible for that purpose. I.C.R.R.Co. v. Ashline, 171 Ill.313.

It is also insisted by appellant that the court erred in refusing to permit the entries on the stub of a note book offered by him to the jury. Entries contained upon the stub of a note book may be competent as bearing on the existence of such a note, yet such evidence is not admissible for the purpose of establishing the indebtedness of a party. Simer v. Kults, 194 Ill.App.242; George S. Kennedy vs. Barrett, 148 Ill.App.414.

It may be observed that witnesses were allowed to testify after refreshing their memory from this stub so appellant was not prejudiced by the ruling of the court even if said stub were properly admissible in evidence.

Lastly it is contended by appellant that the verdict of the jury as to the value of the property not found is excessive. Appellant admits that the evidence shows $155. without taking into account the corn. The evidence tends to show that there was some 600 bushels of corn which was taken possession of by appellant, and while the evidence discloses that the greater part of this corn was fed to the stock in question, at the same time the evidence also discloses that had the stock and the corn been delivered to the administrator on the death of said deceased and had the same been sold by the administrator within a reasonable time as fixed

Complaint is also made of the Court's refusal to permit a bill of exceptions showing the testimony of a deceased witness taken at a previous trial of this cause. Such evidence may be proven by any person who heard and remembers the evidence, but a bill of exceptions is not admissible for that purpose. I.C.R.R. Co. v. Phillips, 171 Ill.315.

It is also insisted by appellant that the error erred in refusing to permit the entries on the back of a note book offered by him to the jury. Entries contained upon the back of a note book may be competent as tending to the existence of such a note, yet such evidence is not admissible for the purpose of establishing the indebtedness of a party. Diser v. Lutz, 154 Ill.App.[illegible] Chicago [illegible] Barrett, 146 Ill.App.414.

It may be observed that witnesses were allowed to testify after refreshing their memory [illegible] appellant was not prejudiced by the ruling [illegible] even if said statements were [illegible] in evidence.

Lastly it is contended by [illegible] that the verdict of the jury as to the value [illegible] is excessive. [illegible] without taking into account the [illegible] to show that there was [illegible] taken possession [illegible] that the greater part [illegible] quantity, [illegible] had the stock on the [illegible] trains on the day [illegible] sold by the railroad [illegible]

by law, the greater part of this corn would have been for sale and would have brought more than enough with the $155. to have made up the amount of the verdict of $4[illegible]. Appellant by holding the stock in question and feeding the corn to the same cannot escape liability for the corn by reason of the fact that he fed the same to said stock. Appellant is not in position to complain of the size of said verdict. The evidence is sufficient to support the same.

Other errors were assigned on the record but we do not believe them of sufficient importance to warrant a discussion here. Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

by law, the proper part of this corn would [illegible] and would have brought more than enough with the [illegible] to have made up the amount of the verdict or [illegible] holding the stock in question and feeding the corn to [illegible] cannot escape liability for the corn by proof of the fact that he fed the same to said stock. [illegible] in position to complain of the size of said [illegible]. The evidence is sufficient to support the [illegible].

Other errors were assigned on the [illegible] we do not believe them of sufficient importance to [illegible] discussion here. Finding no reversible error in the record the judgment of the trial court will be affirmed.

Judgment affirmed.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

57a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 644

Mary E. Hill,
Appellee

vs.

No. 56
March Term, 1918.

Prennie A. Gash et al,
Appellants

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Wayne COUNTY

TRIAL JUDGE

HON. CHARLES H. MILLER

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the ~~foregoing~~ is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

Term No. 56. In the Appellate Court Agenda No. 25

of Illinois, Fourth District.

March Term, A. D. 1918.

212 I.A. 644

Mary L. Hill, Appellee vs. Prennie A. Gash, et al, Appellants	Appeal from Circuit Court of Wayne County, Illinois.

Opinion by Boggs, P. J.

This is an action of forcible detainer commenced by appellee against appellants before a Justice of the Peace of Wayne County. The complaint in substance charges that appellee is entitled to the possession of lot five in the original town, now city of Fairfield, Illinois and that appellants unlawfully with hold the possession thereof.

Upon a hearing had before the Justice a judgment was rendered in favor of appellee and against appellants for the possession of the premises and costs. An appeal was taken by Prennie A. Gash to the Circuit Court of Wayne County, Illinois. Appellant, Samuel Gash, was made party to said cause in the Circuit Court by summons.

When the cause was called for trial, the appellant, Prennie A. Gash, by her attorney entered a motion for a continuance on the ground that she was sick and by reason of said sickness was unable to attend said trial. Said motion was supported by the affidavit of her husband, Samuel Gash. The court denied said motion and a jury was impanneled and sworn. Appellee introduced his evidence but appellants took no further part in the trial of said cause. The jury returned

Term No. 56. In the [illegible] Court, [illegible] No. 28
of the [illegible] District.
[illegible]

21 21 A. 644

[illegible]	
Appellee	
vs.	[illegible]
Fronnie M. [illegible], et al.,	[illegible]
Appellants	

Opinion by [illegible].

This is an action of [illegible] brought by appellee against appellants before a Justice of the Peace of [illegible] County. The complaint in an [illegible] that appellee is entitled to the possession of [illegible] in the original town, now city of [illegible], [illegible] appellants unlawfully [illegible] the [illegible].

Upon a hearing had before [illegible] was rendered in favor of appellee [illegible] for the possession of the [illegible] taken by [illegible] to the [illegible] County, [illegible] to said cause [illegible] result [illegible] [illegible] Fronnie [illegible] by [illegible] a [illegible] [illegible] appellants appealed by [illegible] the court [illegible] [illegible] appellee [illegible] [illegible] no further [illegible] [illegible]

a verdict finding the appellants guilty. A motion was made by appellants for a new trial, which motion was denied and judgment was entered. To reverse said judgment this appeal was taken.

It is first contended by appellants that the court erred in overruling the motion made by appellant, Prennie A. Gash, for a continuance. The affidavit in support of said motion is as follows: "S.M.Gash, being first duly sworn, on oath states that he is the husband of said Prennie A. Gash, defendant in said cause, that the said Prennie Gash, is sick and her condition is such that she is not able to attend a trial of said cause at this term." The affidavit was wholly insufficient on which to base a motion for a continuance for the reason that it fails to state that appellant had a meritorious defense and also fails to state any facts expected to be proven by the testimony of appellant or that the attendance of appellant on the trial of said cause was in any wise necessary. The court did not err in refusing a continuance based thereon. Wick v. Webber, 64 Ill. 107; Schuell v. Rothboth, 71 Ill. 83; Warrell vs. Winter, 33 Ill.App.36; Mantonya v. Huerter 35 App.27.

It is next contended by appellants that the demand for possession was insufficient on which to base an action for forcible entry and detainer on the ground that no proof was offered to show that said notice or demand was signed by appellee or by anyone for her as her agent. The notice or demand in question was as follows: "To Prennie A. Gash and Samuel Gash: You are hereby notified to quit and deliver up, at the end of the month of your tenancy, expiring immediately after the end of thirty days from this date of the service of ~~up~~ this notice upon you the possession of the following de-

a verdict through the application [illegible]
by appealing to her then [illegible]
judgment was rendered. [illegible]
was taken.

[illegible]
erred in excluding [illegible]
[illegible] instrument. The
motion to be followed [illegible]
oath [illegible]
defend [illegible]
and [illegible]
trial [illegible]
insufficient [illegible]
the [illegible]
orders defense and [illegible]
be proven by the [illegible]
dence [illegible]
wise [illegible]
nance [illegible]
[illegible]
[illegible]

[illegible]
for [illegible]
for [illegible]
was [illegible]
specified [illegible]
[illegible]
[illegible]
at the [illegible]
[illegible]
[illegible]

scribed premises held by you for me, Lot number Five (5) in the original town, now city of Fairfield, Illinois. Dated this 21st day of October 1916," and was signed by Mary E. Hill, by Cooper & Burgess, her agents.

There is no evidence in the record of any kind or character proving or tending to prove either that appellee signed the foregoing notice or demand personally or that the same was signed by Cooper & Burgess as her agents. She does not so testify, nor does any other person undertake to do so.

It is insisted by counsel for appellee, however, that appellee had ratified the giving of this notice or demand and the signing of her name thereto. It is probable that if appellee had offered this notice or demand in evidence, she would have been held to have ratified the signing of her name thereto, and the serving of said notice. However, the ratification would only take effect from the time the notice was offered in evidence. In order to be effective as the basis for an action of forcible entry and detainer under the statute, the ratification must have taken place prior to the beginning of the suit and the notice of ratification must have been brought home to appellants in order that they be bound thereby.

In Ball v. Beck, 43 Ill.482, being an action of forcible entry and detainer for the recovery of the possession of a house and lot the Supreme Court at page 486 says: "There is no evidence that defendant in error signed the notice, nor does it appear that Long, his agent, signed his name, nor is there any evidence, that either defendant in error or his agent ever saw the notice which was served. But the question arises, if this is proved to be a true copy, whether the subsequent acts of defendant in error did not amount to an adop-

sorbed premises held by you for me, at number five (5) in the original town, now city of Mairfield, Illinois, dated this 21st day of October 1916," and was signed by [illegible], by Cooper & Burgess, her agents.

There is no evidence in the record of any kind or character proving or tending to prove [illegible] alleged the foregoing notice or demand personally or that the same was signed by Cooper & Burgess as her agents. [illegible] does not so testify, nor does any other [illegible] to so.

It is insisted by counsel for appellee, however, that appellee had retained the [illegible] of her rents, issues or demand and the signing of her name therein. It is [illegible] that if appellee had offered this notice or demand in evidence, the which have been held to have retained the signature, if not many times, and the serving of said notice, however, the restitution would only take effect from the [illegible] notice was offered in evidence. In order to be effective as the basis for an action of forcible entry and detainer under the statute, the restitution must have [illegible] prior to the beginning of the suit and the notice of restitution must have been brought home to appellants in order [illegible] and thereby.

In [illegible] v. [illegible], [illegible] of forcible entry and detainer [illegible] of a house and lot the [illegible] there is no evidence that defendant in [illegible] does it appear that [illegible] share any evidence, that [illegible] agent ever saw the notice which was [illegible] arises, if this is proved to be [illegible] subsequent act of defendant in [illegible]

tion of this notice as his act, although not genuine. We are inclined to think it did, but such ratification could only bind or operate upon plaintiff in error, from the time it was ratified, and he had notice of the fact. He was not bound to regard an unauthorized notice. If the name of defendant in error was unauthorized when the service took place, it was not his act, and plaintiff in error was not bound to regard it. If unauthorized, there was not when the copy was served, a demand for possession, and there is no evidence that this was recognized as genuine prior to the commencement of the suit, and in the absence of such proof the suit was unauthorized. No doubt the production of the notice on the trial, was a recognition of its genuineness, but that was subsequent to the suing out of process."

Butler, a witness who testified on behalf of appellee testified that he was a constable and that a certain document which was handed to him was "a notice for possession" and he testified that it was served by him on appellants on the 21st day of October 1910, the date of said notice. He does not testify, however, that he served the notice by delivering a copy thereof to appellants. The notice itself was not offered in evidence, nor the return thereon made by said constable so that there is nothing in the record to show as to how this service was made. The proof, therefore, of the service, even if a notice of demand was good, is insufficient, Section 11 Chapter 8 of Hurds Revised Statutes.

The action of forcible entry and detainer is a statutory proceeding, summary in its nature and in derogation of the common law, and it therefore follows that the conditions and requirements of the statute conferring jurisdiction must be clearly shown and the mode of procedure provided must

tion of this notice to his act, [illegible] fact. [illegible] inclined to think it [illegible] blind or operate upon [illegible] rantized, and [illegible] notice [illegible] regard an unauthorized [illegible] error was unauthorized [illegible] not his act, and [illegible] it. If unauthorized, [illegible] a decree for possession, [illegible] was recognized as [illegible] suit, and in the absence [illegible] thorized. In doubt the [illegible] was a recognition [illegible] quent to the suing out [illegible]

Further, a witness [illegible] police testified that he was [illegible] document which was handed to him [illegible] and he testified that it was [illegible] on the first day of [illegible] does not [illegible] living, a copy [illegible] was not filed [illegible] said [illegible] show as to [illegible] of its service, [illegible] sufficient, [illegible]

The [illegible] statutory [illegible] of the common law, [illegible] tion the [illegible] must be clearly [illegible]

be strictly pursued. Steiner v. Priddy, 28 Ill.179; Schaumtoeffel v. Belm, 77 Ill.567; French v. Miller 126 Ill.611; Burns v. Nash, 23 Ill.App.552; Fitzgerald v. Quinn, 165 Ill. 360.

It was further contended by appellants that there was nothing in the record to show when the lease of the premises began and as to whether it was a tenancy from month to month. The record, however, discloses that appellant went into possession of the premises on the 21st day of March 1916, and appellee testified to the effect that her best recollection is that she rented the premises on that day to appellants, but she states that the lease was for no particular period. Counsel for appellants, however, in their brief treat the tenancy as a tenancy from month to month. The language used being "Here the tenancy was from month to month at a monthly rental of $7. and a thirty days notice, by the landlord, to quit and deliver up possession was essential, and lies at the very foundation of the right of action in this suit for forcible detainer." Appellants are therefore not in a position to raise the question that the record does not disclose that said tenancy is from month to month.

For the reasons above stated the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported in full.

be strictly waived. Tanner v. [illegible], [illegible] [illegible] [illegible]
[illegible] v. Hein, 77 [illegible].557; French v. [illegible] [illegible]
Burns v. Swan, 23 [illegible].App.[illegible]; [illegible] [illegible]
366.

It was further evidenced by [illegible] there did not
was nothing in the record to show [illegible] the tenan-
tees began and as to whether it was a tenancy [illegible] month to
month. The record, however, disclosed [illegible] that went
into possession of the premises on [illegible] March 1976,
and specifies testified to the effect [illegible] recognition
tion in that she rented the premises [illegible] month-
ly, but she stated that the lease [illegible] contract
period. Counsel for appellant, however, [illegible] trial
treat the tenancy as a tenancy [illegible] the
language used during these the tenancy [illegible] month
at a monthly rental of [illegible], and [illegible], the
landlord, to [illegible] and deliver up the [illegible] premises,
and lies at the very foundation [illegible] in
this suit for possible [illegible] therefore
not in a position to raise the [illegible] not
not disclose that said tenancy [illegible]

For the reasons [illegible] the
trial court will be reversed and [illegible] remanded.

[illegible]

Not to be reported in full.

OPINION

FEE, $ .....

58a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 644

Ben Clark,
Appellee

vs.

No. 39
March Term, 1918.

C.C.C.& St.L.Ry.Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 39. Agenda No.23

March Term, 1918.

Ben Clark, Appellee v. The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Appellant	212 I.A. 344 Appeal from Saline.

Opinion by Higbee, J.

---oOo---

On the 21st day of November, 1916, appellee, while at the railroad station of appellant in the village of Carrier Mills in Saline county, in this state, was struck by some heavy timbers which fell from a car of a passing freight train, thrown down, dragged along the platform and severely injured.

To recover damages for these injuries he brought suit filing a declaration of two counts, both of which charged that appellant was possessed of and operating a railroad through Carrier Mills and maintained a depot platform and grounds in that village to accommodate the public in receiving and discharging passengers, freight and express, and for the purpose of delivering freight and express to the public; that it had extended an invitation to the public to visit said depot platform and grounds for the purpose of attending to said business matters; that appellee was a resident of Carrier Mills and on said day was upon said platform at the invitation of appellant, for the purpose of inquiring of and receiving from the agent of appellant a certain express package; that while standing upon appellant's platform and in

Term No. 39.

Green Term, 1916.

Ben Clark,

Appellee

v.

The Cleveland,Cincinnati,Chicago and St.Louis Railway Company,

Appellant

Opinion by Hughes,

---oOo---

On the first day of November, [illegible] at the railroad station of [illegible] in the [illegible] county Mills in Saline county, in this state, [illegible] heavy timbers which fell from a [illegible] thrown down, dragged along the [illegible]

To recover damages for [illegible] suit filing a declaration [illegible] charges the [illegible] road through Carter [illegible] and [illegible] in that [illegible] delivering and discharging [illegible] for the purpose of [illegible] public; that it had so carried [illegible] visit and depot platform [illegible] tending to a [illegible] of [illegible] the invitation of [illegible] and receiving [illegible] package; that [illegible]

the exercise of due care and caution for his own safety, he was knocked down and injured by three timbers thrown from a freight car which composed part of a train then passing through said village at an excessive rate of speed. The first count also charged negligence in loading said timbers on said car and failing to provide proper means for holding the same in place; also negligence in operating said train through said village, past said depot platform and grounds by running the same at a highly excessive rate of speed so that three of said timbers were thrown upon appellee. The second count charged negligence by running the train at a rate of speed in excess of six miles an hour in violation of an ordinance of the village limiting the maximum speedof freight trains to that rate and also charged negligence in loading and securing said timbers on said car and in the operation of the train. Appellant filed the general issue and the trial resulted in a verdict and judgment for $1750 in favor of appellee.

On the occasion of the injury appellee had gone to appellant's railroad station in Carrier Mills to receive or get information, as he testified, concerning a case of birds which he had been notified would be sent him by express from Georgetown, Illinois. It appears that express packages were not delivered to customers at their homes at that place but it was the general custom for the owners of the same to go to the station and get them. When appellee reached the station the agent was absent and appellee walked down the platform where he met a man named Looper who also had business there and with whom he fell into conversation. Appellant's railroad track at that place ran in a northeasterly and southwesterly direction and while the two men were talking a freight

the exercise of due care and caution [illegible]
was knocked down and injured by three timbers [illegible]
freight car which composed part of a train [illegible] passing through
said village at an excessive rate of speed. [illegible]
also charged negligence in coupling [illegible]
and failing to provide proper [illegible]
place; also negligence in operating [illegible]
village, past said depot platform [illegible]
same at a highly excessive rate of speed [illegible]
said timbers were thrown upon appellee [illegible]
charged negligence by running the [illegible]
in excess of six miles an hour in violation [illegible]
the village limiting the maximum speed [illegible]
that rate and also charged negligence [illegible]
said timbers on said car and in the [illegible]
Appellant filed the general issue [illegible]
a verdict and judgment for $1750 [illegible]

On the question of [illegible]
appellant's railroad station [illegible]
got information, on his testimony [illegible]
which he had been notified [illegible]
Georgetown, Illinois. [illegible]
not delivered to consignee [illegible]
it was the general custom [illegible]
to the station and [illegible]
tion the agent was absent [illegible]
form where [illegible]
and with [illegible]
road track at that place [illegible]
erly direction and [illegible]

train approached from the southwest. Appellee and his companion then started to walk along the station platform towards the east. Roper went into the waiting room when the door was reached but appellee continued walking towards two other acquaintances of his who were sitting on the truck near the northeast end of the platform. When appellee was near the north east end of the railroad platform, being at the time some eight or ten feet from the railroad track, three pieces of heavy timber slipped off of one of the flat cars in the train and striking the ground, whirled around, hit him, knocked him down and dragged him along the platform, leaving him some 66 feet from the waiting room door with pieces of lumber on top of him. He was severely injured, was unconscious for many hours and his injuries are permanent. The freight train in question had 39 cars in it among which were three flat cars loaded with lumber, consisting of joists two inches thick, 12 inches wide and 20 to 22 feet long. This lumber was loaded lengthwise on the cars and piled some four or five feet high. It was some of this lumber which fell off a car and injured appellee. The train passed through the station at a speed estimated at all the way from 12 to 15 miles an hour, without checking or stopping while passing through the limits of the village and none of the train crew knew of the lumber falling off or of appellee's injury until they reached the next station some three miles north of Carrier Mills, where they received a message advising them that lumber was falling from one of their cars.

It is one of the contentions of appellant that appellee was a mere loiterer or trespasser on the depot premises and that appellant owed him no duty except to refrain

train approached from the southwest. [illegible] the men in question started to walk along the railroad [illegible] side the east. Roper went into the ditch [illegible] was reached but appellee continued walking [illegible] quaintance of his who were fishing. [illegible] northeast end of the platform. [illegible] north east end of the railroad [illegible] some eight or ten feet from the [illegible] of heavy timber piling on it [illegible] train and striking the ground. [illegible] knocked him down and dragged him along [illegible] him some 66 feet from the railing [illegible] lumber on top of him. He was severely [illegible] serious for many hours and was injured [illegible] freight train in question has [illegible] three box cars loaded with lumber, [illegible] inches thick, 12 inches wide and [illegible] lumber was loaded lengthwise [illegible] or five feet high. It was some of [illegible] a car was injured in [illegible] station at a speed estimated at [illegible] miles an hour, it was crashing [illegible] through the train on the yard [illegible] knew of the lumber [illegible] they reached the [illegible] Carter [illegible] the lumber was [illegible] appellee was [illegible] pleasures and [illegible]

from injuring him wilfully or wantonly. It appears to us unnecessary to discuss this question further than to say that the declaration alleged that appellant was at the station for the purpose of inquiring of and receiving from appellant's agent an express package and while appellant questions appellee's motives in being there the proof is substantially uncontradicted that he was on the premises for the purpose claimed by him. He therefore was at the station for a lawful purpose connected with the business of the company and had a right to demand of the company the exercise of reasonable care and caution for his safety. A large portion of the brief and argument for appellant is devoted to a discussion of the doctrine of res ipsa loquitur as applicable to the case. Appellee insists, however, that it is not necessary for him to invoke the aid of this doctrine for a recovery in this case and that as a matter of fact he does not rely upon it. The declaration charges specific acts of negligence and appellee introduced evidence in support of the same. One of the specific charges made was that appellant was negligent in loading timbers, another was negligence in the means used to hold the timbers in proper place on the car. Upon these questions appellee introduced testimony tending to show that the lumber in question was loaded on flat cars piled from 6 to 8 feet high; that three big timbers were thrown out from the rear end of one of the cars; that two of the wires for stake fasteners at the top of the stakes placed at the side of the car were broken and hanging loose, and that the stakes were set in the coal car loose in the bottom without any means of holding them in place.

from injuring him wilfully or wantonly. It appears to be unnecessary to discuss this question further in view that the declaration alleged that appellant [illegible] for the purpose of injuring [illegible] appellant's agent an express, malice and willful premeditated [illegible] appellee's motives in going there [illegible] unconstitutional that he was at the [illegible] claimed by him. He therefore [illegible] purpose connected with the business of the company and he a right to demand of the company the exercise of reasonable care and caution for his safety. A large portion of the brief and argument for appellant is devoted [illegible] doctrine of res ipsa loquitur [illegible] Appellee insists, however, that it [illegible] him to invoke the aid of this doctrine for a recovery in this case and that as a matter of fact [illegible] it. The declaration contained specific [illegible] appellee introduced evidence in [illegible] of the specific charges [illegible] in locating timber, another [illegible] to hold the timbers in proper place [illegible] questions propriety introduced [illegible] the timber in question was [illegible] to a test light, that [illegible] the rear end of one of the [illegible] stake driver at the top [illegible] of the car were broken and [illegible] were not in the condition [illegible] means of holding them in place.

On the other hand appellant contends and introduced proof to show that the cars were properly loaded and that they were examined at Cairo where the train started, at Vienna a short distance south of Carrier Mills and again at Ledford a short distance north of Carrier Mills and it was found that the stakes were all in place; that strips or boards were nailed across the top of the same and that there was no indication of improper loading. This question was therefore a contested one with proof on both sides and was one proper for the jury to decide. It was further charged in the declaration that the speed limit of six miles an hour provided for by the ordinances of the village of Carrier Mills was exceeded by the freight train in question in passing through that place and this was fully proven and in fact not contested by appellant. Appellant seeks to make the point however that the ordinance offered in evidence upon this question was void because it limits the speed of passenger trains to eight miles an hour in violation of the express provision of the statute. This point is not well taken, as an ordinance may be valid in part and invalid in part and the valid part will be enforced although the invalid part may be void. White v. City of Alton, 149 Ill.626, Wilburt v. City of Springfield, 123 Id. 402. That portion of the ordinance which limited the speed of freight trains passing through the village to six miles an hour, was therefore valid notwithstanding the portion of the same ordinance which limited the speed of passenger trains to eight miles an hour, may have been void. Our statute provides that "Whenever any railroad corporation shall, by itself or agents, run any train, locomotive engine or car at a greater rate of speed in or through the incorporated limits of any city, town or village, than is

On the other hand [illegible] and introduced
proof to show that the cars were properly [illegible]
they were examined at Cairo where the train [illegible]
a short distance north of Cairo [illegible]
a short distance north of [illegible]
the brakes were all in [illegible]
mailed across the top of the car [illegible]
indication of improper loading [illegible]
a contested one with [illegible]
for the jury to decide. It was further [illegible]
tion that the speed limit of six miles [illegible]
by the ordinance of the village of [illegible]
needed by the freight train in [illegible]
that place and this was fully proven [illegible]
ted by opposition. [illegible]
that the ordinance offered in [illegible]
was void because it fixes the speed [illegible]
eight miles an hour in [illegible]
the statute. This point is not [illegible]
may be valid in part and invalid in [illegible]
will be enforced although [illegible]
White v. City of [illegible]
Springfield, 102 [illegible]
limit of the speed [illegible]
less than six miles [illegible]
ing the portion of [illegible]
of passenger trains [illegible]
void. [illegible]
portation shall, [illegible]
engine or part of [illegible]
incorporated limits [illegible]

permitted by any ordinance of such city, town or village, such corporation shall be liable to the person aggrieved for all the damages ~~dawn~~ done to the person or property by such train, locomotive engine or car; and the same shall be presumed to have been done by the negligence of said corporation or their agents". Hurd Stat. chap.114, sec.67. The train in question having been run by those in charge of it at a speed in excess of the limit fixed by the ordinance, and appellee having been injured by timbers falling therefrom, while he was in the exercise of ordinary care for his own safety and on the station platform of appellant, where he was in pursuit of business in which he and the company were both concerned; the statute raised the presumption that his injury was caused by the negligence of appellant, and that presumption must prevail unless overcome by the proof. The proofs in this case upon the whole were sufficient to warrant a finding by the jury in favor of appellee. It is insisted by appellant that the verdict was excessive but the injuries of appellee, as shown by the proofs were of such a nature, as we view them, when considered in the light of the amounts concerned in numerous judgments sustained by our courts of appellate jurisdiction, as not to warrant a reversal of the judgment on that ground.

Appellant criticises the first, third and fourth instructions given for appellee, because they use the words "if you believe from the evidence" instead of "from a preponderance of the evidence". These instructions were of course incomplete in the form in which they were given but they were not intended to give information to the jury concerning the amount of evidence required by appellee to prove his case, being directed to other matters. Instruction No.7

his case, using directed to [illegible]
concerning the amount of evidence [illegible] to prove
they were not intended to [illegible]
course [illegible]
[illegible] of the evidence [illegible]
"If you believe from the evidence [illegible]
instructions given for [illegible]

An action against the [illegible]
recovery of the judgment in [illegible]
our courts of equity to [illegible]
the grounds enumerated in [illegible]
nature, as we view them, [illegible]
injuries of appellee, [illegible]
plated by appellant that [illegible]
rant a finding by the jury [illegible]
proof in this case upon the [illegible]
presumption must prevail unless [illegible]
injury was caused by the negligence [illegible]
both concerned; the statute placed the [illegible]
in pursuit of business in [illegible]
nature and on the station platform [illegible]
while he was in the exercise of [illegible]
appellee having been injured by [illegible]
at a speed in excess of the limit [illegible]
train in question having [illegible] in charge of it
tion or their agents". [illegible]

given for appellant was directly devoted to this question and told the jury that the burden of proof was upon the plaintiff to prove by the greater weight of the evidence each and every material allegation of his declaration or some count thereof and unless they found from the greater weight of the evidence that he had made such proof, they should find appellant not guilty and appellant's instruction No. 8 was to the same effect. The jury therefore could not have been misled as to the amount of evidence required by appellee to establish his case, by the inaccuracy of said instructions given for him. A complaint is also made that the court improperly modified appellant's instruction No. 7. This instruction as originally drawn told the jury that appellee was not entitled to recover on account of the excessive speed of the train unless they found from the evidence that such excessive speed was the cause of the lumber falling from said train, but the court modified the same by authorizing a recovery in case such excessive speed was the cause "in whole or in part" of the lumber falling from said train. The instruction as given was misleading for it might well have been that the lumber would have fallen from the train even if it had not been going at an excessive rate of speed, and yet the excessive speed may have been the cause of the lumber being violently thrown when it struck the ground in such a way as to strike appellee. In this connection we refer to the case of Keith v. Commonwealth Elec.Co.,241 Ill.252, where it is stated, "The rules for determining whether a negligent act or omission is the proximate cause of an injury are well established and have been applied by different courts in numerous cases to different conditions of fact. There has been practically no difference of opinion

given for appellant was directly devoted to [illegible] and told the jury that the burden of proof was upon [illegible] plaintiff to prove by the greater weight of the evidence [illegible] every material allegation of his declaration or else [illegible] and unless they found from the greater weight of the evidence that he had made such proof, they should find [illegible] guilty and appellant's instruction [illegible] fact. The jury therefore could [illegible] the amount of evidence required by [illegible] case, by the inaccuracy of said instruction [illegible] A complaint is also made that the court improperly modified appellant's instruction No. 7. This instruction [illegible] drawn told the jury that railroad [illegible] on account of the excessive speed of [illegible] found from the evidence that such was [illegible] cause of the lumber falling upon [illegible] modified the same by substituting [illegible] excessive speed was the cause "in whole or in part" of the lumber falling upon and [illegible] misleading, for it might well have [illegible] have fallen from the car in even if [illegible] an excessive rate of speed, and yet [illegible] have been the cause of the injury [illegible] it struck [illegible] this connection [illegible] [illegible] mining whether a collision [illegible] cause of a injury [illegible] by different courts in [illegible] of fact. Here the [illegible]

as to what the rules are and they may be briefly stated as follows: The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which, in combination with it, causes the injury, or if it sets in motion a chain of circumstances and operates on them in a continuous sequence, unbroken by any new or independent cause". The modification of this instruction by the court caused it to be a correct statement of the law.

The most serious criticism of the instructions by appellant is that which he makes to the fifth instruction given for appellee. That instruction told the jury that "where the instrumentality causing an injury is wholly within the control and management of the defendant and such injury does not ordinarily happen, if those who have such control use ordinary care, then in the absence of proper explanation by themselves, the thing or injury itself is evidence of the negligence of such defendant." This instruction stated a correct principle of law and would have been proper in a case where the doctrine of res ipsa loquitur was involved. It was, however, inapplicable here where specific charges of negligence were made in the declaration and direct proof of the same relied upon to support them. However the jury were fully instructed as to the law governing the case by four other instructions given for appellee, and 17 given for appellant and we are therefore of opinion that the giving of this instruction, although it was not really applicable to the case did not constitute a material error, sufficient to warrant a reversal of the judgment on that account. Upon the whole case we are satisfied that substantial justice has been done and the judgment will therefore be affirmed.

Affirmed.

Not to be reported in full.

as to what the rules are and they may be briefly stated as follows: The negligent act or omission must be the cause which produces the injury, but it need not be the sole cause nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which combination with it, causes the injury, or if it sets in motion a chain of circumstances and operates on them to cause injury, unbroken by any new or independent cause. The sufficiency of this instruction by the court caused it to be a correct statement of the law.

The most serious criticism of the instructions by appellant is that which is made to the fifth instruction given for appellee. That instruction tells the jury that "where the instrumentality causing an injury is solely within the control and management of the defendant and such injury does not ordinarily happen, it raises a presumption of use ordinary care, then in the absence of rebut evidence by the defendant, the fact of injury is evidence of the negligence of such defendant." It is a statement of a correct principle of law and must be [illegible] in a case where the doctrine of res ipsa loquitur is invoked. It was, however, inadvertently made when there was [illegible] negligence were made in the declaration [illegible] the case relied upon to sustain them. [illegible] fully instructed as to the law regarding [illegible] other instructions given for appellee, and [illegible] last and we see the direct [illegible] of this instruction, although [illegible] the case did not constitute a material error, [illegible] rant a reversal of the judgment on that [illegible] the whole case we are satisfied that substantial [illegible] and the judgment will be allowed to stand.

Not to be reported in full. -0-

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 5th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

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Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 644

John L. Becker,
Appellant

vs.

No. 57
March Term, 1918.

Maggie M. Becker,
Appellee

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Fayette COUNTY

TRIAL JUDGE

HON. J. C. MC BRIDE

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the ~~foregoing~~ this is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* December *A. D. 191*8 .

Clerk of the Appellate Court

Term No. 57. Agenda No.26

March Term, A. D. 1918.

John L. Becker, Appellant	)	212 I.A. 644
v.	)	Appeal from Fayette.
Maggie L. Becker, Appellee	)	

Opinion by Higbee, J.

---oOo---

The parties to this suit were married May 1[illegible],1913. Appellant had been married before and had three small children. He and his former wife, however, had separated some years before and he was living with his mother on a farm in Piatt county, the children being taken care of and living with their mother.

Appellee was employed by appellant as a domestic in the home of himself and his mother when she was sixteen years of age. After appellee had been in the family about two years, he and his former wife were divorced and he took the three children into his own family and from that time on they lived there as members of his household. It was about a year later that the marriage of appellant and appellee took place. The marriage was not a happy one and trouble soon arose between appellant and his wife. It appears she did not get along well with appellant's mother or his children and that appellant would side with them against the wife and call her abusive names. She claims that about a year after their marriage and a month before the birth of a child to them, he jerked her around the room and threatened to slap her be-

Term No. 57.

Lucas Term, [illegible]

John T. Weaver, Appellant	
v.	
Emma L. Weaver, Appellee.	

Opinion by [illegible].

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The question to be [illegible] Appellant and [illegible] dren. He and [illegible] years before and [illegible] that county, [illegible] with their mother.

[illegible] the home [illegible] of life. [illegible] years, [illegible] three children [illegible] lived [illegible] later [illegible] the [illegible] award [illegible] abusive [illegible] right and a [illegible] joined [illegible]

cause she had slapped his daughter then some ten or eleven years of age; that he cursed her; that on another occasion when appellee instructed a girl in their employ to clean up some milk that was spilled upon the floor and the girl refused to do it, appellant cursed his wife, told her he would slap her if she ever touched the girl and then instructed his wife to leave which she was willing to do, but as he would not let her take the baby, she did not go. On still another occasion when there was some controversy between appellee and her mother-in-law appellant again cursed his wife and told her to leave which she agreed to do and in accordance therewith, a contract for separation was drawn up, he paid her $342, gave her some furniture and in August, 1916, she went to the home of her mother in Fayette county. Later he came to where she was living and persuaded her to return to him under a promise of better treatment and she gave him back the $342, the most of which he invested in new furniture for their house After her return, however, she claims that he became worse than ever and she wrote to her sister to send her some money so she could consult an attorney; that appellant saw this letter in her possession and when she refused to let him read it, he seized her, threw her down on the floor, placed his knees on her arms and by force took it away from her and read it; that this attack on her person caused her much pain. After this occurrence, which took place November, 1916, she again left him and went to her mother's, where she was quite ill, the result, as she claims, of his abuse, Appellant then took a couple of neighbors with him, went to see his wife and they persuaded her to again return and live with him. Sometime after her return, trouble arose between them, because she said

cause she had slapped his daughter been some ten or eleven years of age; that he warned her; that on another occasion when appellee instructed a girl in their employ to clean up some milk that was spilled upon the floor and the girl refused to do it, appellant cursed his wife, telling her she should slap her if she ever touched the girl; and that instructed his wife to leave which she was willing to do, but he would not let her take the baby, she did not [illegible] another occasion when there was some controversy between appellee and her mother-in-law appellant again cursed his wife and told her to leave which she agreed to do and in accordance therewith, a contract for separation was drawn up, he paid her $242, gave her some furniture and in August, 1[illegible], she went to the home of her mother in Fayette county. Later he came to where she was living and persuaded her to return to him under a promise of better treatment and she gave him back the $242, the most of which he invested in new furniture for their house. After her return, however, she claims that he become worse than ever and she wrote to her sister to send her some money so she could consult an attorney; that she did not say this letter in her possession and when she refused to let him read it, he seized her, threw her down on the floor, placed his knees on her arms and by force took it away from her and read it; that this attack on her [illegible] much pain. After this occurrence, which took place [illegible], the again left him and went to her mother's, where she was quite ill, the result, as she claims, of his abuse. Appellee then took a couple of neighbors with him, went to see his wife and they persuaded her to again return and live with him. Something after her return, trouble arose between the [illegible] and

-4-

that appellant's daughter would steal, at which time he got angry, pushed appellee back on the bed, caught her arms and hands and twisted and wrenched them, giving her great pain and causing a lump to come on her wrist. On still another occasion when the wife told appellant his mother had lied if she said something she was reported to have said, he grabbed her and pushed her back in the window and twisted her arms and hands very hard. About a week after this last attack she left her husband and after working at various places, again on July 4, 1917 went to her mother's in Fayette county. Later she filed a suit against her husband for divorce and alimony and to recover certain personal property she claimed, in which she charged him with extreme and repeated cruelty.

Upon the trial appellee testified to substantially the above facts, but appellant denied that he exercised any personal violence against her except on one occasion when he testified to taking hold of her. The occasion admitted by him was the one when he wanted to see the letter she had and he states that at that time he only took hold of her and held her hands across her breast while he took the letter and read it and that he did not throw her on the floor and put his knees on her arms. Complainant's sister and the sister's husband testified for her, that they stayed some four weeks with appellee and appellant and while they remained there there were quarrels between the parties, but they never saw any acts of personal violence on the part of appellant. A brother of appellee testified for her as to some remarks of appellant but he knew nothing about any violence offered by appellant to her. In fact no one testified to any act of violence against her but appellee herself and these were denied by appellant except upon the one occasion above men-

that appellant's daughter [illegible], at which time he got angry, washed supplies back in the box, [illegible] and hands and twisted one wrenched [illegible], giving her [illegible] and causing a lump to come on her arms. [illegible] occasion when the wife told [illegible] she said something, she was repeated [illegible], he [illegible] her and pushed her back in the [illegible] and hands very hard. About a week after [illegible] her bruised and after making [illegible] July 4, July went to her mother's [illegible] she filed a [illegible] and to recover certain [illegible] which she charged him with [illegible].

Upon the trial [illegible] the above facts, but appellant denied [illegible] any personal violence against her except [illegible] testified to taking hold of [illegible] him was the one when [illegible] he struck at her [illegible] her hands across her [illegible] it and [illegible] knees on her [illegible] husband testified for her, that [illegible] with a [illegible] there were [illegible] any acts of [illegible] further or [illegible] appellant [illegible] regarding [illegible] violence against her [illegible] denied by [illegible]

tioned when he said he simply held her hands in order that he might get a letter from her and that he did not injure her. The jury to which the case was submitted found the issues of extreme and repeated cruelty in favor of appellee and the court granted her a divorce with alimony. Appellee presents an abstract of record pertaining to alimony and suit money a part of which refers to an allowance made to appellee to permit her to defend the decree in this court but nothing is submitted to us for review by the record except the decree pertaining to the divorce and we cannot consider other questions.

In a case of this kind where the acts of cruelty which appellee relies on to entitle her to a divorce are testified to by her alone and are denied by the husband, it is clear that the instructions to the jury should have stated the law applicable to the case with strict accuracy. Instruction No. 1 given for appellee was as follows: "The defendant is charged with having been guilty of extreme and repeated cruelty to his wife and you are to determine that question from the evidence in the case. Cruelty must consist of some personal violence and in this case, if the jury believe from the evidence that the defendant on two or more occasions used personal violence to his wife thereby inflicting pain or personal injuries upon her, together with other wrongs done by him to her, then he has been guilty of extreme and repeated cruelty to her within the meaning of the law". This instruction in effect directs a verdict under the circumstances named and by the use of the words "together with other wrongs done by him to her" appears to assume that there were other wrongs done by appellant. Whether there were other wrongs done by appellant to appellee than the actsof personal

tioned when he said he simply held her hands in order that he might get a letter from her and that he did not injure her. The jury to which the case was submitted found the issues of extreme and repeated cruelty in favor of appellee and the court granted her a divorce with alimony. Appellee presents an abstract of record pertaining to alimony and but money a part of which refers to an allowance made to an order to permit her to defendant the decree in this court. Nothing is submitted to us for review by the record except the decree pertaining to the divorce and we cannot consider other questions.

In a case of this kind where the ground of cruelty which appellee relies on to entitle her to a divorce are testified to by her alone and are denied by the husband, it is clear that the instructions to the jury should have stated the law applicable to the case with strict accuracy. Instruction No. 1 given for appellee was as follows: "The defendant is charged with having been guilty of extreme and repeated cruelty to his wife and you must decide the first question from the evidence in the case. Cruelty must consist of some personal violence and in this case, if the jury believe from the evidence that the defendant on two or more occasions used personal violence to the plaintiff sufficiently painful or personal injuries upon her, [illegible] with intent wrongfully to do by him to her, then [illegible] of extreme and repeated cruelty to her within the meaning of the law." This instruction in effect directs a verdict upon the circumstances named and by the use of the words "together with other wrongs done by him to her" seems to assume that there were other wrongs done by appellant. Whether there were other wrongs done by appellant to appellee [illegible] personal

violence referred to, were questions of fact for the jury and it was not the province of the court to intimate to them that such other wrongs had been done. The instruction was also erroneous in telling the jury that appellant had been guilty of extreme and repeated cruelty to appellee if they believed from the evidence that he "on two or more occasions" used personal violence to his wife thereby inflicting pain or personal injuries upon her, together with other wrongs done by him to her. In Lenning v. Lenning, 176 Ill.180, our supreme court had under consideration an instruction in a divorce case which told the jury that if the defendant had been guilty of two or more acts of physical violence to the person of the complainant he was guilty of extreme and repeated cruelty and that in considering such acts of violence, if ~~they~~ any appeared, they might properly consider any abuse or indecent language used by the defendant in the presence of the complainant, as tending to characterize such acts of violence, if they found from the evidence, such language was used. In connection with this instruction, the supreme court adopted the language used by the appellate court when the case was before it, as follows: "It is elementary that the court should not assume the province of the jury and tell them that physical violence is necessarily cruelty as is done in this instruction. Whether two or more acts of physical violence to a person, is cruelty, depends on the character of the violence, the manner of the person committing it and all the circumstances attending such acts, as well as many other matters which could be enumerated that might have a bearing in determining whether the particular violence is cruelty or not". In accordance with the principle

violence referred to, were questions of fact for the jury and it was not the province of the court to intimate to them that such other wrongs had been done. The instruction was also erroneous in telling the jury that appellant had been guilty of extreme and repeated cruelty to appellee if they believed from the evidence that he "on two or more occasions" used personal violence to his wife thereby inflicting pain or personal injuries upon her, together with other wrongs done by him to her. In Lanning v. Lanning, 174 Ill.180, our supreme court had under consideration an instruction in a divorce case which told the jury that if the defendant had been guilty of two or more acts of physical violence to the person of the complainant he was guilty of extreme and repeated cruelty and that in considering such acts of violence, if they appeared, they might properly consider any abuse or indecent language used by the defendant in the presence of the complainant, tending to characterize such acts of violence, if they found from the evidence, such language was used. In connection with this instruction, the supreme court condemn the language used by the appellate court when the case was before it, as follows: It is elementary that the court should not see to the province of the jury and tell them that physical violence is necessarily cruelty as is done in this instruction. Either two or more acts of physical violence to a person, in cruelty, depends on the character of the violence, the manner of the person committing it and all the circumstances attending such acts, as well as many other matters which should be considered that might have a bearing in determining whether or not physical violence is cruelty or not. In a certain case it would

laid down by the supreme court as above, we must hold that the instruction above referred to in the instant case, was erroneous and should not have been given.

For the reasons above stated the decree of the court below will be reversed and the cause remanded.

Reversed and remanded.

McBride, J., took no part in the hearing of this case.

Not to be reported in full.

laid down by the supreme court as above, we must hold that the instruction above referred to in the instant case, was erroneous and should not have been given.

For the reasons above stated the decree of the court below will be reversed and the cause remanded.

Reversed and remanded.

Mr Justice, J., took no part in the hearing of this case.

Not to be reported in full.

OPINION

FEE, $ .....

60a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 644

Christ Miofski et al,
Appellants

vs.

No. 60
March Term, 1918.

Ziso Dimitroff et al,
Appellees

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. LOUIS BERNREUTER

Term No. 60. Agenda No.35

March Term, 1918.

Christ Miofski et al, Appellants v. Ziso Dimitroff, et al, Appellees	212 I.A. 644 Appeal from Madison.

Opinion by Higbee, J.

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Appellants, Christ Miofski, Dimitri Miofski and Tarpo Miofski, filed their bill of complaint in the circuit court of Madison county against appellees, Ziso Dimitroff, Robert Bethmann, St. Louis Brewing Association and Gustav Niemann, asking that their rights and interests under an agreement concerning certain real estate be determined, that the agreement be declared a mortgage, that an accounting be had, that they be permitted to redeem their respective interests in the real estate upon payment of the sum found due and chargeable against the same and for other relief. Dimitroff disposed of his interest in the real estate to Bethmann, disappeared and was not served. Bethmann was and Niemann is trustee of the St. Louis Brewing Association, the substantial appellee. Bethmann, the St. Louis Brewing Association and Niemann answered and appellants filed replications thereto. The case was referred to the master who made his findings of facts and conclusions of law, finding that appellants were not entitled to have the bill dismissed with their costs. Objections were made and exceptions preserved. A decree was entered in accord with the findings and conclusions of the

Term No. 67.

March [illegible], 1960.

Junior Jackson et al,	
Petitioners	
v.	
Ohio Tuberculosis, et al,	
Respondent	

Petition for [illegible]

[illegible]

master. Appellants assign numerous errors and bring the case to this court on appeal.

The real estate involved is lot eleven in block C of the southern extension of Granite City in the Village of Madison, Madison county, Illinois. September 7, 1907 James Cakalis, Lombro Poppilips and Ziso Dimitroff, the owners of said real estate, issued their joint note, payable to themselves, for $6500, secured by mortgage on said real estate, and on March 19, 1908, pledged the same to the International Bank of St. Louis to secure a loan. Bethmann endorsed upon the collateral note, "Heim Brewery Branch, St. Louis Brewing Association, will take up this note when due. Robt. Bethmann, Agr." The makers defaulted and on June 15, 1908 Bethmann paid their note and took over the collateral note and security, which he held until produced before the master. January 17, 1908, Vangel Checroff bought a one-fourth interest in the property. August 2, 1908, Christ Ficiski contracted to buy the interest of James Cakalis and completed his purchase and received his deed January 26, 1909. Bethmann seems not to have acquired title to the collateral by sale and purchase, as provided in the terms of the note, but about September, 1908 instituted suit in the name of St. Louis Brewing Association to foreclose the mortgage, which suit was pending when the agreement, which is the basis of this proceeding, was signed, whereupon the foreclosure suit was dismissed. Negotiations covering considerable time, both parties being represented by counsel, resulted February 24, 1909, in contemporaneous execution of a deed by James Cakalis, Lombro Poppillips, Ziso Dimitroff, Vangel Checroff and wife and Christ Ficiski, conveying and warranting said real estate to Robert Bethmann, and

master. Appellants assign numerous errors and brings the case to this court on appeal.

The real issues involved [illegible] of the southern extension of Franklin [illegible] of Madison, Madison county, Illinois. Appellee, [illegible] Jesse Oakalle, Lambro Compilipo and [illegible], the owners of said real estate, leased their [illegible] receiver, for [illegible], secured by mortgage on [illegible] and on March [illegible], 1908, pledged the [illegible] Bank of St. Louis to secure a loan. [illegible] the corporate seal, "State Reserve [illegible] Association [illegible] will [illegible] Mgr." The makers defaulted and on June [illegible] their note was taken over [illegible] which he held until produced [illegible] 1908, [illegible] property. August 7, 1908, [illegible] interest of [illegible] received his good security 26, [illegible] quired title to the [illegible] vided in the terms of the [illegible] initiated suit in the name of [illegible] foreclose [illegible] remount, which is the basis [illegible] whereupon the [illegible] covering considerable time, [illegible] counsel, resulted [illegible] cution of [illegible] Trustee, [illegible] verging the warranties [illegible] and

and a joint agreement between Robert Bethmann first party and Christ Miofski, Lombro Poppillips, Ziso Dimitroff and Vangel Checroff, second parties, both dated February 1, 1909, the latter being the agreement in issue. The consideration in the deed was $6500 and after the description there was inserted, "subject to mortgage indebtedness of $2000 payable five years after date, without interest, to Vangel Checroff and Lombro Poppillips, for which grantee has given his notes and a further consideration of $556 to the Granite City Lime and Cement Company, which grantee agrees to pay this day in cash."

The agreement provided that first party, in consideration of certain payments and performances by second parties agreed to convey theproperty to second parties five years from date of agreement; first party to repair, keep insured and pay taxes for said term; first party topermit second parties to occupy property during term for dramshop, boarding house and grocery and cause them to be supplied with Heim beer; second parties to pay first party $10590.30 and all sums paid by him for taxes, insurance and repairs, with interest as follows, $75 on the first day of each month during the term and at the end of the term the balance of the $10590.30; also the expenditures for taxes, insurance and repairs with interest, either in cash or by mortgage at their election and upon tender of deed by first party; second parties agreed to conduct a dramshop in thepremises during the term and sell Heim beer exclusively; second parties were privileged to pay more than $75 a month if they desired and to pay off the entire amount and receive their deed but should conduct the dramshop and use Heim beer throughout the term in any case; second parties to forfeit $100 a month for violating provision relative to heim beer; on failure of second parties to make the

and a joint agreement between Robert Berkman first party and Charles Bielski, Sonnie Poppilipe, Alex Ambroff and Angel Chacroff, second parties, both dated January [illegible], the latter being the agreement in issue. In consideration the deed was [illegible] and after the execution thereof, "subject to mortgage indebtedness of [illegible] aggregate five years after date, without interest, to [illegible] Sonnie Poppilipe, for which grantee [illegible] further consideration of [illegible] Company, which grantee agrees to pay [illegible]."

The agreement provides that [illegible] eration of certain payment and [illegible] tiee agreed to convey [illegible] from date of agreement [illegible] and pay taxes for said [illegible] tiee to convey property [illegible] house and grocery one [illegible] second parties to pay [illegible] by him for taxes, insurance [illegible] follows, "To be first [illegible] and at the end of the [illegible] the expenditures for taxes, insurance [illegible] est, either in cash or by [illegible] tender it deed by first [illegible] dict [illegible] been satisfactorily [illegible] than [illegible] amount and receive [illegible] and use [illegible] parties to [illegible] live to [illegible]

monthly payments as provided, for three successive months or more, or failure to pay for or use Heim beer, or failure to keep any other covenant, first party was privileged to declare agreement null and void; if second parties at any time failed to make payment or give mortgage as provided first party was privileged to declare agreement null and void, retain all payments made and recover $100 a month. Upon execution of said deed and agreement Bethmann gave Poppillips his note for $500 and Checroff his note for $1500 and paid the Granite City Lime and Cement Co. as provided in the deed. November 1, 1909 Tarpo Kiofski bought the interest of James Cakalis in the property and under the agreement to which reference was made. On April 15, 1910, Bethmann took up the Poppillips note at a discount and June 14, 1910 he took up the Checroff note at a discount. June 28, 1912 Dimitri Kiofski bought the interest of Vangel Checroff in the property. Appellees claim there was a forfeiture under the agreement about August 1, 1913. October 16, 1913 Ziso Dimitroff quit claimed to Bethmann his interest in theproperty and surrendered and relinquished to Bethmann his interest under the agreement. The same day Bethmann gave Dimitroff a lease of thepremises for a term ending March 1, 1914 at $125 a month. In September, 1913 Dimitroff had assumed possession of the premises in his own name, painted out the signs, substituted others of his own and taken charge of and appropriated to his own use the personal property of the partnership. On December 19, 1913, which was after he had quit-claimed to Bethmann, Dimitroff served upon Dimitri Kiofski and Tarpo Kiofski a demand for rent. On February 9, 1914, Bethmann served upon Dimitri Kiofski and Tarpo Kiofski a demand for rent, and sued them before a justice of the peace and they were evicted. The Kiofski brothers

monthly payments as provided, for [illegible] or more, or failure to pay tax or [illegible] keep any other covenant, that [illegible] agreement null and void; [illegible] to make against [illegible] privileged to declare [illegible] mente made the [illegible] deed and [illegible] and [illegible] and terms [illegible] Motors bought the interest of [illegible] and under the [illegible] April 16, 1917, [illegible] county and [illegible] county. June 29, 1917, [illegible] Vangi [illegible] a foreclosure under the [illegible] June 16, [illegible] interest in [illegible] mann [illegible] gave [illegible] Karon [illegible] had [illegible] pointed out in [illegible] taken [illegible] property of [illegible] after [illegible] binding [illegible] February 9, 1[illegible] [illegible] June [illegible] [illegible]

had turned the business management of the partnership over to Dimitroff who was to collect the revenues and keep up the payments. Suspecting Dimitroff was not keeping up the payments the Siofski brothers, with an interpreter went to Bethmann to see about the matter. He claimed not to know them, denied that they had any interest in the building and directed them to his attorney in Edwardsville. This suit followed.

The evidence oral and documentary, shows that the last payment under the written agreement in question was made August 19, 1913. It was credited in the book of appellants by the agent of appellees. That being the case appellees could not, under the terms of the agreement, declare a forfeiture for failure to make the payments provided for, at the time they attempted or pretended to do so, unless the written agreement can be modified and reformed in the manner contended for by appellees. The agreement provided that Bethmann pay all taxes, insurance and repairs upon said property as they accrued during the five year period mentioned and that he should be reimbursed therefor, at the end of said period by the second parties. It is claimed by appellees that this provision did not express the intention of the parties and that it should have provided for the payment of all taxes, insurance and repairs on said property by the parties of the second part; that in this respect there was an error or mistake in the contract and that such mistake was mutual. This, however, was denied by appellant Christ Siofski. There was evidence introduced on behalf of appellees to show that this claimed error was brought to the attention of the parties of the second part in June, 1913. Before Bethmann paid the Checroff note; that Checroff desired to have his note paid in order that he might use the proceeds in the partnership

had turned the business management of the partnership over to Dimitroff who was to collect the revenues and keep up the payments. Respecting Dimitroff [illegible] payments the Stoski brothers, with an interest [illegible] common to see about the [illegible]. He claimed not to know [illegible] that they had any interest in the building and referred them to his attorney in Edgerdaville. [illegible]

The evidence [illegible] that the last payment under the written agreement [illegible] was made August 19, 1913. It was credited [illegible] by the agent of [illegible] not, under the terms of the agreement, [illegible] for failing to make the payments [illegible] they asserted or pretended to [illegible] agreement can be modified and [illegible] ded for by appellees. [illegible] pay all taxes, insurance and [illegible] the accused during the [illegible] should be reimbursed therefor, [illegible] the second parties. [illegible] provision did not [illegible] it should have provided for the [illegible] surrender and [illegible] second party [illegible] take in the [illegible] however, [illegible] evidence [illegible] clause error [illegible] of the second part [illegible] Therefore, that [illegible] in order that [illegible]

business; that at the time of the payment of the note by Bethmann and in consideration of his doing so, all of the members of the partnership agreed to modify said contract in accordance with the intention of the parties and to pay the taxes, insurance and repairs upon said property from that time to the expiration of said five year period. That this modification was made or that the members of the partnership thereafter paid to Bethmann any money on account of insurance taxes and repairs was denied by complainants. The bill in this case did not specifically ask for the reformation of this agreement. Even if it should be claimed under the general prayer for relief, we are met by the rule that equity will not reform a written agreement except upon clear evidence and the alleged mistake must be uncommon to both parties. (Salurian Oil Co. v. Neal, 277 Ill.45; Quinner v. McConnell, 17 Ill.212), and the evidence in this case does not appear to us to sustain the contention of appellees that there was a mistake common to both parties to the written agreement. It must also be borne in mind that the written agreement relied upon by appellants was an executory contract under seal while the modification thereof contended for by appellees as having been made at the time of the payment of the Checroff note, was a verbal executory contract and it is well settled that an executory contract under seal can not be modified, varied, discharged or released by an executory verbal contract. (Belonze v. Gibbons, 157 Ill.App.1o6 and cases cited.) As the original contract cannot be modified in the manner claimed by appellees and as the last payment of .75 under the contract was made in August, 1913 and the forfeiture sought to be enforced before the next monthly payment became due, the forfeiture was premature and cannot be given effect.

business; that at the time of the payment of the money by Heumann and in consideration of his making it, all of the members of the partnership agreed to modify the original agreement in accordance with the intention of the parties in regard to the taxes, insurance and repairs upon and property from that time to the expiration of said five year period. At this modification was made or that it was made [illegible] therefore therefor paid to [illegible] any [illegible] and of insurance taxes and repairs was denied by defendants. The bill in this case did not specifically ask for the rescission of this agreement. Even if it should be claimed under the general prayer for relief, we are not [illegible] that equity will not relieve a written agreement [illegible] evidence and the alleged mistake must be [illegible] to justify [illegible]. (Johnson [illegible] v. [illegible], 277 [illegible] McDonnell, 17 [illegible]), and [illegible] does not appear to be [illegible]. The [illegible] there was a [illegible] written agreement. It does not [illegible] written agreement relied upon [illegible] under seal while the [illegible] appliance or [illegible] made or the [illegible] the Detroit case, [illegible] will rescind [illegible] modified, varied, [illegible] court [illegible] (Gibson v. [illegible] cited.) [illegible] manner [illegible] under the contract [illegible] bought to be entered [illegible] one, the [illegible]

(Palmer v. Ford, 70 Ill.369; King v. Radeke, 175 id.72.)

Upon the trial certain letters written to appellees by their attorneys were admitted in evidence over objection of appellants. These letters should not have been admitted as they were in the nature of self serving instruments so far as appellee was concerned. The vital question raised by this record concerns the character of the contemporaneous deed. It is contended by appellants that these two contracts in reality constituted a mortgage of the property in question, while on the other hand it is contended by appellees that the deed from Bethmann was, and was intended to be, nothing but a plain deed to the property and that the contract made at the same time, was simply an agreement that the parties of the second part named therein, should have a right to repurchase the same upon complying with said conditions. Where in such a case a doubt exists from all the surrounding circumstances as to whether the instrument or instruments in question constituted a deed or a mortgage, a court of equity will lean to the holding that the transaction constituted a mortgage rather than a sale of theproperty. In equity the form of the transaction is to be regarded but the substance must control. Preschbaker v. Harman, 32 Ill.475. It is a well known rule of equity that what is once a mortgage is always a mortgage until the equity of redemption has been foreclosed or barred. Lenore v. Thompson, 46 Ill. 214. The two instruments in question taken together, appear to us to clearly show that the deed in question, while in form an ordinary deed to the premises was really intended to operate as a mortgage and such being the case, appellants were entitled to the relief prayed for in their bill and the court below

(Bauer v. Bore, 70 [illegible] King v. [illegible], [illegible]).

Upon the trial certain letters written to [illegible] by their attorneys were read in evidence over objection of appellants. These letters should not have been admitted as they were in the nature of [illegible] statements so far as appellee was concerned. The trial court [illegible] by this record concerns the [illegible] deed. It is contended by appellants [illegible] in reality constituted a mortgage [illegible] while on the other hand it is [illegible] deed from [illegible] was, and [illegible] a plain deed to the property [illegible] the [illegible] the second part named therein [illegible] in such a case a [illegible] conveyance as to whether the [illegible] question a [illegible] will lead to the holding [illegible] a mortgage rather than a [illegible] form of the transaction is to be [illegible] sure of [illegible] well known rule of equity [illegible] a mortgage until the [illegible] or waived. [illegible] v. [illegible] [illegible] show that the [illegible] deed to the grantee [illegible] mortgage [illegible] to the [illegible]

erred in dismissing the same for want of equity. The decree in this case will be reversed and the cause remanded in order that the equities between the parties may be fully adjusted in accordance with the views herein expressed.

Reversed and remanded.

Not to be reported in full.

[illegible]

[illegible] in distributing the [illegible] for work of equity. The decree in this case will be reversed and the [illegible] remanded in order that the equities between the parties may be [illegible] in accordance with the [illegible] expressed.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

61a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

212 I.A. 645

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

People of the State of Illinois,
Defendant in Error

vs.

No. 3
March Term, 1918.

W. O. Warren,
Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Clinton COUNTY

TRIAL JUDGE

HON. THOMAS M. JETT

Term No. 3. In the Appellate Court, Agenda No. 27

Fourth District.

~~October~~ March Term A. D. 1918.

People of the State of Illinois, Defendant in error. vs. W. O. Warren, Plaintiff in error.	212 I.A. 645 Writ of error to the Circuit Court of Clinton County, Illinois.

McBride, J.

The defendant in error obtained judgment against plaintiff in error in the Circuit Court for $25.00 and costs of suit, to reverse which this writ of error is prosecuted.

The defendant in error has failed to file a brief in this case and under the provisions of Rule 27, the cause is reversed pro forma and remanded for want of a brief by defendant in error.

REVERSED AND REMANDED.

Not to be reported in full.

Term No. 5. In the Appellate Court, (Agenda No. 27

Fourth District.

March
October Term A. D. 1912.

People of the State of Illinois, Defendant in error.	21214. 546
vs.	Writ of error to the Circuit Court of Fulton County, Illinois.
W. O. Warren, Plaintiff in error.	

Morris, J.

The defendant in error obtained judgment against plaintiff in error in the Circuit Court for $ 5.00 and costs of suit, to reverse which it is said error is prosecuted.

The defendant in error [illegible] a brief in this case and under the provisions [illegible] 37, the cause is reversed pro forma and remanded [illegible] judgment of reversal by defendant in error.

Reversed and remanded.

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* December *A. D. 191*6.

Clerk of the Appellate Court

OPINION

FEE, $ .....

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice
CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 645

Town of Omphghent,
Appellee

vs.

No. 5
March Term, 1918.

Henry Gussewelle,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Madison COUNTY

TRIAL JUDGE

HON. J. F. GILLHAM

Term No. 5. In the Appellate Court Agenda No.30

of Illinois, Fourth District.

March Term, A. D. 1918.

212 I.A. 645

Town of Omphghent, Appellee, vs. Henry Gusewelle, Appellant.	Appeal from the Circuit Court of Madison County, Illinois.

McBride, J.

This action was brought to recover a penalty under the statute for obstructing a highway. The jury was waived and the cause heard by the presiding Judge. The Court found the defendant guilty and assessed a penalty of Five Dollars.

It appears from the record in this case that in 1876 the commissioners of highways of the Town of Omphghent laid out a highway of the width of fifty feet, the center of such highway being the section line between sections 28 and 29, Township 6 North, Range 7 West of the Third Principal Meridian, in the Town of Omphghent, Madison County, Illinois. A portion of this road passed along the lands owned by appellant upon one side and Zirges upon the other side. The appellant claims that he understood the road to be laid out of the width of forty feet and built his fence twenty feet from what he supposed was the section line. There is a very sharp conflict in the evidence as to the location of the section line. Appellant's farm is located in the northern half of section 28, and the farm of Zirges is located in section 29 and opposite the farm of appellant. There are what the witnesses term or call four stones, or corner stones, as shown by the evidence, being a corner stone at the southwest corner

Term No. 5. In the Appellate Court
of Illinois, Fourth District
Held at Mt. Vernon, on the 1st day of
October, A.D. 1971.

Town of Coffeyburg,
Appellee,

vs.

Henry Greenville,
Appellant.

Appeal from the Circuit Court
of Jackson County, Illinois.

Morrison, J.

This action was brought to recover [illegible] for the statute for obstructing a [illegible]way. The jury returned and the court found by the preponderating [illegible] the defendant guilty and assessed a fine [illegible]

It appears from the [illegible] 1970 the commissioners [illegible] laid out a highway [illegible] such highway being the section line [illegible] 20, township 6 north, [illegible] Meridian, in the Town of [illegible] A portion of the Town [illegible] last upon one side and [illegible] petition claims [illegible] the width of forty [illegible] what is supposed was the [illegible] counsel in the evidence [illegible] line. Apparently [illegible] section 20, and the [illegible] and separate the [illegible] means town or [illegible] by the evidence, [illegible]

of section 28 called stone number one, stone number two near the northwest corner of the Southwest Quarter of section 28, stone number three in a northerly direction and at the distance of about one-fourth mile, and stone number four at the northwest corner of said section 28. Appellant obtained the line for building his fence by running a straight line from stone number three to stone number two. It is contended by appellant that stones numbered two and three are on the section line, while appellee contends that the stones are several feet west of the section line and are not government corners.

A dispute arose as to whether or not appellant's fence was located upon the highway as laid out by the commissioners. Appellant notified the commissioners that they must grade the road and make it safe. During the year 1914 the commissioners of highways of said township gave notice to appellant to remove his fence from off the highway, and shortly thereafter he did remove the same east the distance of about fifteen feet and then notified the commissioners that he had removed the same and sent them a written notice saying: "You are hereby notified that all the land I have in cultivation belonging to the public highway may be taken to the highway at any time". It further appears that during the month of March of the next year the appellant moved his fence back west the distance of about ten feet and within about five feet of where it stood before its first removal, and the fence, as it stood after he moved it back in March, 1915, is the obstruction complained of by the appellee. Notice was served upon appellant to remove this obstruction, which he failed to do, and suit was then instituted.

As we view this case, there are two principal questions involved, one with reference to the location of

of section 28 called stone number one, stone number two near the northwest corner of the Southwest Quarter of section 29, stone number three in a northerly direction [illegible] the distance of about one-fourth mile, and stone number four at the northwest corner of said section [illegible] and the line for building the fence by running a straight line from stone number three to stone number two. [illegible] and in appellant that stones number two and three [illegible] section line, while appellee contends that [illegible] twenty feet west of the section line and [illegible] owners.

A dispute [illegible] fence was located upon the highway [illegible] misdemeanor. Appellant notified the board of [illegible] they must grade the road and make it [illegible] the commissioners of highways of [illegible] to appellant to remove the fence [illegible] shortly thereafter he did remove [illegible] of about fifteen feet [illegible] he had removed the fence [illegible] ing: "You are hereby notified [illegible] cultivation adjoining to the [illegible] the highway at any time. [illegible] month of March of this year [illegible] fence back west the [illegible] about five feet [illegible] and the fence, [illegible] 1915, is the [illegible] Notice was served upon [illegible] which he failed to [illegible]

As we view this case, [illegible] questions involved, [illegible]

stones numbered two and three as to the section line, and the other as to the effects of the moving back of the fence by appellant in 1914. There was much testimony introduced as to the use of the highway with reference to appellant's land since the laying out of the same, some of the witnesses stating that the land had been used for a portion of the time east of the location of the present fence, and others that the travel had been west of this fence ever since the laying out of the road, but as we view it the use of the highway, or the acquisition of the road by prescription is not material in this case.

There was a sharp conflict between the witnesses as to the location of the several stones above mentioned with reference to the section line. Appellee had two surveys made, and so did appellant, for the purpose of determining where the section line was with reference to these stones. George B. Schaffer, County Surveyor of Madison County, testified that he had been engaged in the business of surveying for about ten years, and that he had given the question of the location of the section line between sections 28 and 29 considerable study; that he made a survey of this section line and located the stones above referred to with reference to the section line; that he found stones numbered one and four to be government corners and run a line between these two points and located stone number two, which he found to be twenty-nine and one-half feet west and five and twenty-five hundredths feet south of a correct position, and said it was not a correct position either from east to west, or from north to south, and that it was not a government corner. He also testified that he further tested the location of this stone by running a line east and west and verified his for-

stones numbered two and three as [illegible], and the other as to [illegible] of the order [illegible] of the lines by appellant in 1914. [illegible] as to the man of the [illegible] with reference [illegible] land since and having [illegible] stating that the land [illegible] east of the location of the [illegible] the tracts [illegible] out of the [illegible] the condition of the [illegible] in this case.

There was a survey [illegible] as to the location of the [illegible] reference to the section line [illegible] and so did [illegible] the section line was with reference to [illegible] B. Sanders, county [illegible] that [illegible] about ten years, [illegible] location of the section [illegible] and located the [illegible] the section line [illegible] to be government corners [illegible] points and [illegible] twenty-nine [illegible] hundred feet [illegible] was at a correct position [illegible] north to [illegible] also testified [illegible] stone by number, [illegible]

mer finding as to the location, and stone number three he also located a few feet west of the section line and said that neither of these stones or section corners were placed there by the government. Appellant also had a surveyor by the name of C. A. Shepherd, who made the measurements between these section lines and agreed with Mr. Schaffer as to the corner stones at the southwest and northwest corners of section 28, and that a straight line passed about where Mr. Schaffer located it, but that if stone number two is taken into consideration the line would be west of that. He says that in his measurements he assumed stone number two to be a government corner and based his survey upon this assumption.

It seems to us that the Court was justified in finding that the care exercised by the surveyor Schaffer was entitled to the greater credit, because of the fact that he made the proper tests, and as he says, he run the line in accordance with the rules laid down by the government of the United States for finding such corners. We are of the opinion that the survey as made by Schaffer is the correct one, and that stones numbered two and three are west of the section line, and that the line used by appellant in locating his fence was a false one, and that his fence was located inside of the road, as laid out by the commissioners of highways.

Counsel for appellant in their brief say: If the section line, as so located by Schaffer, is the center of the road as laid out by the commissioners in 1876, then probably the defendant might be guilty. On the other hand the surveyor Charles A. Shepherd, who was employed by appellant to make a survey of this road and a man who has had vast experience in surveying and engineering work, found

mer finding as to the location, one [illegible]
also located a few feet west of the section line on a
the neither of these corners or mon[illegible]
there by the government. [illegible]
the mons of [illegible]. Therefore, [illegible] between
these section lines [illegible]
corner stones at the [illegible]
tion "B", and that a sufficient [illegible]
Schaffer located it, [illegible]
into consideration [illegible]
that in [illegible]
a government corner [illegible]

[illegible]
finding [illegible]
was entitled to [illegible]
that [illegible]
line in accordance [illegible]
ment of the [illegible]
of the opinion [illegible]
courtesy [illegible]
of [illegible]
locating [illegible]
located [illegible]
of [illegible]

[illegible]
section [illegible]
the [illegible]
[illegible]
the surveyor [illegible]
[illegible]
[illegible]

that the section line and the center of this road was according to the stones or monuments described in the evidence as numbers two and three, and if his theory is correct, then the fence, or obstruction in question, is twenty-six feet east of the center line of the road". Upon the finding as above made the concession of counsel for appellant would be sufficient to warrant an affirmance of this judgment without further comment, but we regard the fact that upon notice given by the commissioners of highways the appellant moved his fence back the distance of fifteen feet, to a point, as appellee says, that was sufficient for their road purposes, as being a more important one, and as having a more binding effect upon appellant than the other question.

It appears that there was much dispute as to this road, and about appellant's fence being upon the highway, and about a portion of the land that he had fenced being a part of or belonging to the highway. It seems that there was necessity for grading the road and repairing it so as to make it safe, and appellant even went so far as to notify the commissioners that if any accident happened on account of the highway being out of repair, that they would be held responsible for it, and while matters were in this condition the appellee made a written demand upon the appellant to move his fence back to its proper place; that in pursuance of this demand the appellant did at once remove his fence back east the distance of about fifteen feet, and then gave the commissioners notice that he had moved it back; that the land that he had in cultivation could be taken to the highway at any time. He also told the Town Clerk that he had moved his fence and said to him: "I moved my fence now and if they want any more ground why they have got to take it by law." This

same statement was made to several other persons and is not specifically denied.

Under the conditions that existed at the time the notice was given to remove his fence, the appellee was claiming the land upon which his fence was located as part of the highway and demanding it, and appellant under such conditions moved his fence and said for them to take it and use it for the highway. Even though they were not entitled to it, yet if he had turned it out to them in settlement of a disputed matter, and it was accepted by them, then this would be sufficient to constitute a giving of that part of his land for the highway, and that having given it and turned it out to them at their request he would be estopped from again saying that any part of it belonged to him, or that he was entitled to again take it without the consent of the highway commissioners. Even if the commissioners were not legally entitled to the road and were not claiming it under such a right, yet if under such conditions the appellant moved his fence back and gave them the road requested, this would have all the elements of a dedication and would in law, as we view it, constitute a dedication of this land, and having, once given it and set his fence back he could not retake it. We think the Court was warranted in finding that the commissioners had a right to recover a penalty for the obstruction of the highway by appellant.

It is next insisted that the Court erred in refusing to permit the witness Blume to testify that when he was commissioner he recognized stones numbered two and three as the center line of the highway. While it may be true that this would have been admissible for the purpose of showing the intent with which appellant acted, yet as the penalty inflic-

some statement was made to [illegible] not specifically denied.

Under the [illegible] the notice was given to [illegible] line-ing the land upon which [illegible] part of the highway and defending it, [illegible] conditions moved his fence and [illegible] the highway. [illegible] it, but it he [illegible] turned it [illegible] matter, and it was [illegible] sufficient to [illegible] the highway, and that [illegible] at their request [illegible] that any part of it [illegible] again have it without [illegible] lawful. Even if the [illegible] road and were not claiming [illegible] under [illegible] have [illegible] of a relocation [illegible] a declaration [illegible] his fence back [illegible] was [illegible] to recover [illegible] equitable.

[illegible] ing to [illegible] commencement [illegible] the court's [illegible] would have [illegible] injunct [illegible]

ted was only for a small amount, we do not regard it as being very harmful, especially in view of the fact that the offense for which appellant was being prosecuted occurred on account of a removal of the fence after having given the land to the highway, and under such conditions this question could not be very material.

It is said that the proposition of law given at the request of appellee should not have been so held, which holds that if the road in question was in fact open for its entire length the mere fact that it had not been used for the entire width would not prevent the commissioners from recovering a penalty, and if the fence was on the road, as laid out, that the defendant would be guilty. We see no serious objection to this proposition. It was not necessary that the highway should have been used for its entire width. If it had been once opened or laid out as required by law, that made it a road whether used or not, and if appellant obstructed it we see no reason why appellee should not recover. Besides the Court gave the appellant a proposition that if his fence had been placed upon the road in question before the same was laid out and opened, then the defendant would not be guilty. Objection is also made to the Court refusing the proposition submitted by appellant that defendant would not be guilty if there was no intention upon the part of the defendant to violate the law. Under our view of the facts in this case, we can see no place for this proposition, as the defendant clearly intended to obstruct the road by removing the fence after he had once given the highway.

It was next contended that the Court erred in refusing to hold the proposition of law that if the defendant

had been in the notorious, adverse and exclusive possession under a claim of right for more than twenty years, that he would not have been guilty of obstructing the highway. This proposition was covered by the next one that was given by the Court, in which the Court held that the owner of the fee of land over which the public has an easement may extinguish the easement by an open, exclusive, adverse and uninterrupted possession for the statutory period, ~~which~~ where such possession is acquiesced in by the public for such length of time as to raise the presumption of abandonment.

It was next contended that the Court erred in not holding appellant's proposition of law with reference to a prescriptive right. In the view we take of this case we do not regard this as material to its proper determination, for as we have above stated, even though there might not be a prescriptive right, yet under the dedicatory acts of appellant we believe it would be a highway.

We are of the opinion that the Court was warranted in finding that the line by which appellant first established his fence was a false one, and that he placed the fence upon the highway as laid out by the commissioners, and we also believe that when the appellant set his fence back at the request of the commissioners and upon their notice so to do, that this constituted such a giving of the piece of land for a highway, ~~as~~ as was then left outside of the fence, as to bar the appellant from thereafter taking possession of a portion of the land and erecting a fence thereon.

Appellee has assigned cross-errors, insisting that the Court should have imposed a daily penalty for obstructing the highway. Our attention is not called to any number of

days that the obstruction continued in the highway after the notice was given, and this was also a matter largely in the discretion of the Court, and we would not be inclined to disturb the judgment of the Court on that account.

We find no reversible error in this record and the judgment of the lower Court is affirmed.

AFFIRMED.

Not to be reported in full.

days that the obstruction continued in the [illegible] after the notice was given, and [illegible] in the direction of the Court, and we would not be inclined to disturb the judgment of the Court on that account.

[illegible] and the judgment of the Court below must be affirmed

[illegible]

not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191* 0.

Clerk of the Appellate Court

OPINION

FEE, $ .....

632

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 645

Joe Moreen,
Defendant in Error

vs.

No. 9
March Term, 1918.

Wm. C. Niblack, Trustee in Bankruptcy for the O'Gara Coal Co.,
Plaintiff in Error

ERROR TO
~~APPEAL FROM~~

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 9. In the Appellate Court, Agenda No.45

Fourth District.

March Term, A. D. 1918.

212 I.A. 645

Joe Loreen,
Defendant in error.

vs.

Wm. C. Niblack, Trustee in Bankruptcy for the O'Gara Coal Company, a Corporation, Bankrupt,
Plaintiff in error.

Error to Saline County.

McBride, J.

The defendant in error, hereinafter called defendant, recovered a judgment against the plaintiff in error, hereinafter called plaintiff, for one thousand dollars in the Circuit Court of Saline County, Illinois, to reverse which judgment this writ of error is prosecuted.

It appears from the record in this case that the plaintiff was engaged in the business of mining and operating a coal mine in Saline County, Illinois. That said mine had been in operation for several years and its underground works, entries, cross-cuts and rooms had been opened and developed to a considerable extent in the mining out of the coal therefrom. A pair of rooms running parallel to each other, designated as rooms 10 and 11, had been driven off of the 7th north off of the 5th West entry. Room 10 had been driven some distance in advance of room No. 11, and from room No. 10 a cross-cut or a cutting had been driven ahead of No. 11, reaching across No. 11 to its full width, if it had been extended, so that a block of coal existed between this cross-cut and the face of room No. 11, and on the 17th of November 1915 this block of coal had been narrowed down to the

Term No. 9. In the Supreme Court. Appeal No.48

Fourth District.

March Term, [illegible]

Joe Jorson,
Defendant in error,

vs.

Wm. O. Hibben, Trustee in
Bankruptcy for the [illegible]
Coal Company, a [illegible]
Plaintiff in error.

91210.045

Holtride, J.

The defendant in error, [illegible]
dant, recovered a judgment [illegible]
hereinafter called [illegible]
Circuit Court of [illegible]
judgment this writ of [illegible]

It appears [illegible]
plaintiff was engaged [illegible]
ing a coal mine in [illegible]
had been in operation [illegible]
works, entries, [illegible]
developed to [illegible]
coal therefrom. [illegible]
other, designated [illegible]
the 7th north [illegible]
driven some [illegible]
No. 1 a cross-cut [illegible]
No. 12, leading [illegible]
been extended, so that [illegible]
cross-cut and the [illegible]
November 1911, [illegible]

width of about four feet. During the morning of the day aforesaid two loaders had worked until noon in room No. 11 and had loaded six cars of coal out of this room and prepared it for the machine to undercut at the face. The testimony shows that while these miners were at work in the room they tested the roof and found that it was solid. These miners had been at work in this room loading coal for three days prior thereto, working in that room and in No.10 alternately. It also appears that they attempted to wedge down some of the slate in the roof of room No. 11 but were unable to do so and set a prop under it. On the morning of the day of the accident, and within eight hours prior to the time the men were permitted to enter the mine to work, the mine examiner made his examination of the room and says that he found it to be in a safe condition, inscribing the date on the walls of the room and entered his report in the book kept for that purpose, as being safe. He did not place any danger mark in this room, because, as he said, he did not regard it as being dangerous. In the afternoon of that day the defendant was directed by the foreman, together with his buddy, to go into room No. 11 and undercut the same. They sounded the roof of the room and found it solid, as they claim, and placed their machine to under-cut the coal, beginning at the left hand side of the room, and began under-cutting the coal at the face of the room. After cutting a short time they observed that the chain in the cutter of their machine ran loose and the plaintiff's buddy went around to see if the cutter had extended through to the cross-head. It further appears from the evidence that the defendant had been engaged at work in other parts of the mine and had never worked in this room or in this part of the mine and knew nothing about the conditions as they

existed at this place. The foreman was present at the time they commenced work but did not advise the defendant of the cross-cut that had been made ahead or the thinness of the block of coal that they were about to cut. It further appears from the testimony of miners that in under-cutting coal where the machine goes through the block of coal in to an open space or cross-cut beyond that the coal would loosen the support of the rock and cause it to fall, and one of them says that he would figure upon the slate from the roof falling nine times out of ten. Another miner testifies that when you cut through in to an open cross-cut that draw slate, such as they had in that room, as far as it was hanging back, would fall. When the machine cut through the block of coal and weakened the support of the roof the slate fell and injured the defendant.

The declaration consists of three counts. The first count charges that room No. 11 at its face was in a dangerous condition and that the plaintiff carelessly, negligently and wilfully failed to mark such place as dangerous, which it charges was his duty to do. The second count charges that the defendant was employed as a machine helper to undercut the coal in said room and that a dangerous condition existed at the face thereof, and it became the duty of the plaintiff to warn the defendant of the dangerous condition that existed there but that defendant negligently and carelessly ordered him to under-cut said pillar of coal without giving him any warning of the conditions. The third count charges that it was the duty of the plaintiff to furnish the defendant a reasonably safe place to work. That the plaintiff knew that said undercutting machine would

remove a large section of coal at the bottom of said pillar and that when so removed the pressure above was likely to force said pillar down and cause said loose roof to fall upon defendant and injure him. That he did not know of said thin pillar and the existence of said cross-cut and did not have equal means with the plaintiff to know thereof, and that while engaged at his work the coal dropped and the slate fell upon the defendant and injured him.

The contention of plaintiff is that the verdict of the jury is manifestly against the weight of the evidence, and that when the defendant entered room No. 11 to work therein that the roof of the room was safe. That the dangerous condition complained of was created by the prosecution of the work by the defendant and his buddy. While it may be true as contended by plaintiff that the roof when sounded appeared solid at and prior to the time defendant began work in the room but that is not the dangerous condition complained of. It appears that room No. 10 had been cut far in advance of room No. 11, and that a cross-cut had been made from room No. 10 across room No. 11, if extended, and that a block of coal was left between the cross-cut and the face of room No. 11, and that such block of coal had been narrowed to about four feet and that when in this condition the defendant without any knowledge of the cross-cut or of the thinness of the block of coal, and without having worked in this place before, was set to work by the manager to undercut this thin pillar of coal. It further appears from the testimony of the witnesses who were experienced miners that where a thin block of coal, as this was, was undercut some of them saying in nine cases out of ten the weakening of the support would cause the roof to fall, andothers stating that

remove a large portion [illegible] of the [illegible] and that when so [illegible]
force and [illegible]
upon defendant and injure him. [illegible]
this policy [illegible]
have equal rights [illegible]
that while [illegible]
fell upon the defendant [illegible]

The contention [illegible]
the jury, is manifestly [illegible]
and that even the evidence [illegible]
therein that the roof [illegible]
one condition complained [illegible]
of the work by the [illegible]
be true as contended [illegible]
appeared old and [illegible]
in the room but that [illegible]
of. It appears that [illegible]
of room No. 11, and that [illegible]
room No. 10 across [illegible]
block of coal was [illegible]
of room No. 11, and [illegible]
roved to mount [illegible]
defendant [illegible]
thickness of [illegible]
in this place [illegible]
cut this slab [illegible]
testimony of the [illegible]
where a thin [illegible]
of them crying in [illegible]
rup out which [illegible]

that would be the effect of weakening this support and that the slate would in all probability fall as far back as it was hanging, and this was not disputed. It seems to us that where a condition of this character exists in a mine, that the mine examiner and mine manager being men of large experience and experts at this work, should have known that it was dangerous to work at that place and should have known that when that block of coal was cut through that it would weaken the support of the roof and the slate was liable to fall. They certainly knew the conditions as they existed there, and, if they were dangerous, as the jury has found them to be, it became the duty of the plaintiff to have the place marked as dangerous. If the plaintiff knew the conditions as they existed, which it certainly did, then it could not excuse itself from liability because of the fact that the mine examiner made an examination of the roof, or that he and the mine manager might have been mistaken as to the effects of undercutting a thin pillar of coal, as this was, and as to its being dangerous, or because he may have examined the mine in good faith. It is said by counsel for plaintiff that there is no evidence in the record that plaintiff knew before the injury occurred the thickness of the pillar the defendant was engaged in undercutting. The cross-cut was made by the plaintiff, the rooms had been advanced under the directions of the plaintiff and plaintiff does not deny but that he knew of the cross-cut and of the advancement of both of the rooms and we think it very clear that the plaintiff did know or should have known the conditions that existed there. "If the mine is in a dangerous condition and the owner or operator has failed, with knowledge of its condition, to comply with the statute, he is liable, and he cannot

that would be the effect of [illegible]
that the plate could in [illegible]
it was hanging, and this [illegible]
that where a [illegible]
that the [illegible]
experience [illegible]
it was dangerous to [illegible]
that when the block [illegible]
weaken the support [illegible]
fall. They certainly [illegible]
there, and, if they [illegible]
them to be, it became [illegible]
place marked as dangerous [illegible]
as they existed, [illegible]
encourage it will [illegible]
mine examiner [illegible]
and the wire [illegible]
legs of unconstitutional [illegible]
as to it being [illegible]
the mine in [illegible]
that there is [illegible]
before the injury [illegible]
defendant [illegible]
made by the [illegible]
direction of [illegible]
that he [illegible]
of the [illegible]
did know [illegible]
there. [illegible]
owner or [illegible]
tion, to [illegible]

excuse himself on the ground that he had the mine examined, and in good faith thought it was not dangerous. His liability does not rest upon the ground that in good faith or bad faith he thought there was no danger in the mine but upon the ground that he has, knowing the facts which made the mine dangerous, failed to have the statutory marks properly placed in the mine. When the mine owner or operator is advised of the condition in the mine he must place in the mine, if it is dangerous, the statutory marks, and if he fails to do so he acts at his peril and he cannot excuse himself because he or his examiner or manager may think the mine safe". Petitus vs. Spring Valley Coal Co., 246 Ill., 32. So far as defendant knew or had been advised he had no knowledge of the cutting of the cross-cut in advance of room No. 11 or that the body of coal which he was directed to work upon was thin or that cutting under it would weaken the support of the roof. It was, so far as he knew, as appears from this record, a hidden defect. There was a rib of coal between rooms 10 and 11 and this would prevent the defendant from seeing the cross-cut unless he had gone back and come up through room 10 and observed it. The Supreme Court in passing upon this question says, "While appellee was bound to take notice of defects which were patent, he was not required to make an examination for hidden defects, and he might properly act upon the presumption that appellant had used reasonable care in developing the cross-cut and that it had examined it for danger before permitting him to go to work". Superior Coal Co. vs. Keiser, 229 Ill.,33. We are of the opinion that the jury were warranted in finding that a dangerous condition existed at this place and that the plaintiff failed to mark the same as dangerous, and also knew or should have known of the dangerous conditions and failed to warn the defendant thereof.

exonerate himself on the ground that [illegible]
and in good faith thought it was [illegible]
does not rest upon the ground that [illegible]
he thought there was [illegible]
that he was, knowing [illegible]
failed to draw the attention [illegible]
mine. [illegible]
dition in the mine [illegible]
gerous, the statutory [illegible]
at his peril and [illegible]
examiner or fireman or any [illegible]
Spring Valley and [illegible]
knew or had been advised [illegible]
of the cross-cut in question [illegible]
of coal which he was directed [illegible]
cutting under it would [illegible]
was, so far as he knew, [illegible]
defect. There was [illegible]
this would prevent the [illegible]
unless he had given [illegible]
served it. The [illegible]
says, "This [illegible]
which were natural, [illegible]
for hidden dangers, [illegible]
tion time [illegible]
the cross-cut [illegible]
permitting him [illegible]
200 ft., [illegible]
ranged in finding [illegible]
place and that [illegible]
gerous, and [illegible]
conditions [illegible]

It is next contended that the damages are excessive. The evidence shows that the defendant was confined to his bed for about six weeks and went on crutches for about two and a half months and that he was not at the time of the trial yet able to work in the mine, and that his hip is injured and that he is unable to stand erect. The verdict given was only for one thousand dollars and we are not able to say that it was excessive.

It is next contended that the court having permitted the defendant to exhibit his injury to the jury was erroneous and was the cause of excessive damages as claimed. This was in the discretion of the Court and the jury had the right to know the exact condition of defendant's injury, and we do not see that this was error.

It is said that the court erred in giving defendant's instructions three, five, six, seven and eleven. The criticism is, "That all the jury had to do under these instructions was to believe from the evidence that the plaintiff has proven his case as alleged in said count. There is no pretense in them of advising the jury that the failures enumerated in those instructions must be the proximate cause of the injury complained of". And also complains that they ignore the defense that the place became dangerous during the progress of the work. We have examined the counts as shown by the record and do not think the criticism is well taken as each of the counts alleges that the injury was caused by the negligent acts referred to. The other criticisms have been disposed of in this opinion.

It is objected that defendant's instruction seven tells the jury as a matter of fact that the plaintiff carelessly failed and neglected to warn the defendant of the con-

It is most [illegible]

ceeive. The evidence [illegible]

to his bed for [illegible]

two and a half months [illegible]

the trial yet able to [illegible]

injured and [illegible]

given was only [illegible]

to say that it was [illegible]

It is most [illegible]

ted the defendant [illegible]

ponsible and was [illegible]

This was in the [illegible]

right to [illegible]

We do not see that [illegible]

It is said that [illegible]

dant's instructions [illegible]

criticism in [illegible]

structions was [illegible]

will have proven [illegible]

no prudence in [illegible]

enumerated in [illegible]

of the injury [illegible]

ignore the defendant [illegible]

progress of the [illegible]

by the record [illegible]

as each of the [illegible]

the evidence [illegible]

been disposed [illegible]

It is [illegible]

tells the jury [illegible]

legally limited [illegible]

ditions that existed. We do not so read the instruction. The instruction advises the jury that if the dangerous conditions did exist and the plaintiff knew of them then it was his duty to warn the defendant and in such event if the plaintiff carelessly failed and neglected to so warn the defendant and the defendant was thereby injured, as alleged in said count, then you should find the defendant guilty. We do not believe that the instruction is subject to the criticism offered.

It is next insisted that the court erred in the giving of defendant's instruction No. 5, and that it is misleading. The instruction is, "You are instructed in this case it has been admitted the defendant was not operating under the Workmen's Compensation Act, yes and you are further instructed that in view of the defendant having rejected the provisions of this law, it cannot defend/ upon the ground that the plaintiff was guilty of contributory negligence or that the injury was caused by the act of a fellow servant, or that the plaintiff assumed the risk of his employment . The objection to this is that it is misleading and that there is nothing in the record to sustain it. It is true that there is no statement or agreement contained in the record of such an admission but the court here says it was admitted that the plaintiff was not operating under the compensation act. This is included in the bill of exceptions certified to by the court and no specific objection was made, either during the trial or in the motion for a new trial or in the assignment of errors that the defendant had failed to show the posting of notices as required by Section 2 of the Compensation Act. Of course, general assignments of error and causes for a new trial were assigned but the Court's attention was not called

ditions that exist [illegible]

the instruction [illegible]

ditions did exist and the [illegible]

his duty to warn [illegible]

fitt correctly [illegible]

and the defendant [illegible]

court, then you [illegible]

believe that the [illegible]

fered.

It is not a question [illegible]

giving of defendants [illegible]

leading. The instructions [illegible]

case it is a [illegible]

under the "[illegible]

instructed that [illegible]

provisions of [illegible]

the plaintiff [illegible]

the injury [illegible]

the [illegible] initiff [illegible]

location [illegible]

nothing [illegible]

is no [illegible]

an [illegible]

plaintiff [illegible]

is [illegible]

court [illegible]

[illegible]

error [illegible]

notice [illegible]

of course, [illegible]

total [illegible]

to this particular matter and we are constrained to believe that under the statement of the court that it was admitted on trial that it should be treated as such and having been so admitted it will be assumed as a fact and so treated in the trial of the case. Dietz vs. Big uddy Coal & Iron Co., 263 Ill.,48[illegible]. This question, as we gather it from the record, was not made in the trial court and is now made for the first time which practice cannot be permitted.

After a careful consideration of this case we are unable to say that the verdict of the jury is manifestly against the weight of the evidence, or that there was any reversible error committed by the court in the trial of the case and we are of the opinion that the judgment should be affirmed,. which is accordingly done.

JUDGE [illegible].

Not to be reported in full.

to this particular matter and we are [illegible] to believe that under the statement of the [illegible] on trial that it can be treated as [illegible] so admitted it will be answered [illegible] the trial of the case. [illegible] 203 111.,4a . This [illegible] was not made in [illegible] time which practice [illegible].

[illegible] unable to say that the [illegible] point the weight of the evidence, [illegible] variable error committed [illegible] case and we are of the [illegible] affirmed, which is [illegible].

Not to be reported in full.

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 9th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

64a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 545

John R. Gage, Admr.,
Appellee

vs.

No. 34
March Term, 1918.

The City of Vienna, Ill.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Johnson COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 34. In the Appellate Court, Agenda No.21

Fourth District.

March Term A. D. 191

212 I.A. 645

John R. Gage, Administrator of the estate of Thomas J. Gage, dec'd., Appellee.	
vs.	Appeal from the Circuit Court of Johnson County, Illinois.
The City of Vienna Illinois, Appellant.	

McBride, J.

The appellee has entered a motion to strike the bill of exceptions from the files in this case. It appears from the record that judgment was entered herein on November 27, 1917, and that the court at that time gave appellant ninety days from that date in which to present and file its bill of exceptions. An examination of the record discloses that the order approving the bill of exceptions is in the following words, "And for as much therefore as the matters set forth do not fully appear of record the defendant by its counsel tenders this bill of exceptions and prays that the same ~~bxxbe~~ may be signed and sealed by a Judge of this court, pursuant to the statute in such case made and provided. All of which is accordingly done this 11th day of March 1918 as of the 21st day of February A. D. 1918.

A. M. Lewis, Judge."

The filing mark shows filed March 11, 1918, J. A. Carlton, Circuit Clerk.

It will be observed that the judgment was entered on November 27, 1917 and that ninety days was given within

which to present and file a bill of exceptions but the same was not presented to the Judge or filed until the 11th day of March 1918. It is true the statement is made in this certificate that the act is done as of the 21st day of February, 1918, but an inspection of the certificate shows that the making of the certificate was actually done on the 11th day of March and the Circuit Judge had no power to make an entry as of February 21st. It is true that if the bill of exceptions had been presented to the Judge on or before the 21st day of February and he had failed to sign it within the ninety days that that would not have prevented him from having made a proper certificate and having signed it as of the date it was presented, and then he could have directed the clerk to have filed it as of that date and the record would have been complete but this was not done and the record was not filed until March 11, or any order made with reference to its filing, and under the repeated decisions of the Supreme Court of this State it is necessary that the record should be filed within the time prescribed by the order granting the appeal.

It appearing that the bill of exceptions was not presented to the Judge until about fourteen days after the time for presentation had expired, and not having been filed until that date that it is not a part of the record and can not be considered by this court as such, and the motion is well taken and the bill of exceptions is stricken from the files. Hake vs. Strubel 121 Ill., 321; Hall vs. Royal Neighbors, 231 Ill., 185; Pittsburg & Ind. Coal Co. vs. Harder's Fireproof Storage & Van Co.,, 144 App.,486.

which to present one [illegible] in each [illegible] was not presented to the judge [illegible] of March 1918. It is true [illegible] certificate that he not [illegible] February, 1918, but no [illegible] that the hearing [illegible] 11th day of March and [illegible] an entry as of February [illegible] of exceptions had been presented [illegible] the first day of February [illegible] the ninety days [illegible] having made a proper certificate [illegible] the date it was presented [illegible] the clerk to have [illegible] would have been [illegible] was not filed until [illegible] once in its ruling [illegible] Supreme Court of [illegible] should be filed [illegible] preserving the record.

[illegible] presented to the [illegible] time for presentation [illegible] until [illegible] not to consider [illegible] well [illegible] filed. [illegible] Raymond [illegible] Hendrick's [illegible]

The bill of exceptions having been stricken from the files nothing can be considered except the sufficiency of the pleadings, verdict nd the judgment. No complaint is made of the insufficiency of either the declaration or the judgment and upon examination of the same they seem to be sufficient, and under the repeated rulings of this and the Supreme Court of this State the judgment must be affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

The will I [illegible] from
the files relating [illegible] of
the plaintiff, [illegible] is
made of the [illegible]
judgment and upon [illegible]
sufficient, and [illegible]
Supreme Court [illegible]

Not to be reported in [illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 4 *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

65 a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 645

Owensboro Wagon Company,
Appellant

vs.

No. 40
March Term, 1918.

Douglas Tanner,
Appellee

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 4[illegible]. In the Appellate Court, Agenda No.51.

Fourth District.

March Term A. D. 1918.

212 I.A. 645

Owensboro Wagon Company, Appellant.	Appeal from the Circuit Court of Saline County.
vs.	
Douglas Tanner, Appellee.	

McBride, J.

The appellee obtained a judgment against the appellant for $7.50 in the court below, to reverse which judgment this appeal is prosecuted.

It appears from the record in this case that on about November 13, 1914, the appellee ordered from the appellant six Blount wagons and fourteen Owensboro wagons, and one extra bed for an Owensboro wagon, to be delivered to him on about the first of July 1915. The testimony of appellant tends to show that prior to July 1, 1915, appellant shipped the wagons ordered to appellee and inclosed to him bill of lading and invoice covering such shipment. The wagons were shipped by freight and there was a car load of them and appellant claims that at the time of loading the car the wagons, which were knocked down and shipped in pieces, were checked in by its servants and that the wagons were complete as ordered. The appellee admits receiving the car load of wagons and on July 27, 1915, executed notes to appellant covering the shipment of wagons. One of these notes became due on March 30, 1916 but on February 17, 1916 this note was renewed and at that time amounted to $215.08, and this renewal note is the one in question in this case. On July 1, 1916, appellee

Term No. 4[illegible]

[illegible]

[illegible]

Greenshoro [illegible] ;

[illegible]

vs.

Douglas [illegible],

[illegible]

Mobride, J.:

[illegible]

last [illegible]

this a [illegible]

[illegible]

about [illegible]

last six [illegible]

one [illegible]

on about [illegible]

tend [illegible]

the [illegible]

leading [illegible]

shipped [illegible]

pellant [illegible]

which [illegible]

in [illegible]

dered. [illegible]

and [illegible]

the [illegible]

March [illegible]

and [illegible]

is [illegible]

paid $150.08 on this note leaving a balance due of 65.[illegible]. The wagons when received by appellee were placed in his ware house and no particular examination given of them until April 14, 1916, at which time most of the wagons had been disposed of and appellee claims that he then noticed and became aware of the fact that instead of shipping the twenty wagons they had shipped nineteen wagons complete and then different parts of two other wagons, part of which belonged to the Owensboro wagon and part of which belonged to the Blount wagon and that they were so mis-matched that it was impossible to make a wagon out of them. He then advised appellant of the fact and requested appellant to ship him such parts as were necessary to make this wagon complete and to complete another one. This appellant refused to do unless he would pay cash in advance or in some manner secure the shipment; whereupon the appellee offered to return the several parts of wagons at his own expense but appellant refused to receive them and brought suit upon this note in question.

The several notes given by appellee to appellant contained a clause providing that the title to the property was to remain in appellant until the goods were paid for. Upon the trial of this case a jury was waived and the cause tried by the court by consent, but there were no propositions of law submitted to the trial court by either of the parties, and the question presented to us is, "Are the facts sufficient to warrant a finding for the appellee".

There was evidence tending to show, and the lower court was warranted in finding from this record:

1st. That the appellee ordered from appellant 14 Owensboro wagons and six Blount wagons and one extra bed;

paid $125.00 on this note [illegible]
The wagons were [illegible]
house and no particular [illegible]
April 14, 1910, [illegible]
posed of and specific [illegible]
aware of the fact that [illegible]
they had shipped [illegible]
parts of two other [illegible]
Owensboro wagon and [illegible]
and that they were [illegible]
make a wagon out [illegible]
fact and requested [illegible]
necessary to make [illegible]
one. This negotiation [illegible]
in advance or [illegible]
the specific [illegible]
his own expense [illegible]
brought suit [illegible]

The [illegible]
contained a [illegible]
was to remain in [illegible]
Upon the trial [illegible]
tried by the court [illegible]
of law [illegible]
and the [illegible]
to warrant [illegible]

[illegible]
court was [illegible]
I [illegible]
Owensboro [illegible]

2nd. That appellant shipped to appellee 20 wagons, nineteen of which were complete and the remaining wagon consisted of parts of a Blount wagon and parts of an Owensboro wagon and that the parts were of that character that they could not be placed together so as to make a complete wagon.;

3rd. That this mistake was not discovered until the time the sale of the wagons was about completed and after the wagons had been settled for by note and after the note in question had been renewed;

4th. That upon discovering the mistake appellee advised appellant of the mis-matched parts and made an order to supply the missing parts so as to make two complete wagons. The appellant refused to accept the order and supply the missing parts unless appellee would pay for them in advance or secure the same; thereupon appellee offered to return to appellant at his (appellee) own expense the mis-matched parts of the wagons but appellant refused to accept them;

5. The wagons at the time of the making and acceptance of the order were of the value of $65.00 each and this was the price at which they were purchased but that these wagons at the time they should have been delivered complete were of the value of $72.50.

It further appears from the evidence of appellee that the mis-matched parts of the wagon were of no value to him as a dealer in wagons and that appellee not only lost his wagon but a profit of $7.50.

It is true that there was testimony offered by appellant tending to show that the order was properly filled and twenty complete wagons were shipped to appellee. Also that the mis-matched parts of wagons were of the value of $65.00 but these were matters of dispute upon which the tes-

3rd. That [illegible]

ninetean or twenty [illegible]

alted to water or [illegible]

wagon and that the [illegible]

could not be [illegible]

4th. That [illegible]

the time the [illegible]

the wagons had been [illegible]

in question had been [illegible]

5th. That upon [illegible]

vised appellant of the [illegible]

supply the plaintiff [illegible]

the appellant [illegible]

sine qua non [illegible]

secure the [illegible]

a [illegible]

of the [illegible]

6. [illegible]

nce of the [illegible]

was the price [illegible]

wagons at the [illegible]

were at the [illegible]

[illegible]

that the [illegible]

him [illegible]

his wagon [illegible]

[illegible]

appellant [illegible]

and [illegible]

that the [illegible]

[illegible]

timony was conflicting and the court found these facts in favor of appellee.

There were no questions of law submitted to the trial court and none can arise in this court, and we are unable to say that as the testimony was conflicting upon the material questions that the finding of the court upon the facts was manifestly against the weight of the evidence, and unless we should so find we have no right to disturb the finding of the lower court.

We are of the opinion that the lower court was warranted in finding that appellant failed to ship the twenty wagons complete as ordered; that the mis-matched parts were of no value and that when appellant was advised of the mis-matched parts it should have either completed the order as requested or have accepted the different parts so mis-matched and given the appellee credit for them. This they did not do and we believe that the court was warranted in finding that the appellee was entitled not only to credit for $65.00, the purchase price of the completed wagon, but was also entitled to the profit upon this completed wagon at the time of its delivery, which appears from the evidence of appellee to have been $7.50 for which amount the court gave appellee judgment, and we are of the opinion that there is no such error in rendering this judgment as would warrant this court in interfering with it, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

timony was conflicting and the court [illegible] in favor of [illegible].

There were no [illegible] the trial court and none [illegible] to say that we [illegible] tial questions [illegible] was manifestly against [illegible] law we should [illegible] ing of the lower court.

We are [illegible] ranted in finding [illegible] weapons complete [illegible] of no value [illegible] matches [illegible] requested or [illegible] and given the [illegible] and we believe [illegible] the specific [illegible] purchase price [illegible] to the profit [illegible] deliver [illegible] been 7.50 [illegible] and we are of the [illegible] rendering it in [illegible] ferring [illegible]

Not to be reported in [illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 5th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

66a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 646

Della Kirk, Admrx.,
Appellee

vs.

No. 47
March Term, 1918.

Federal Coal Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Williamson COUNTY

TRIAL JUDGE

HON. BENJAMIN W. POPE

Term No. 47. In the Appellate Court, Agenda No. 24

Fourth District.

March Term A. D. 1918.

Della Kirk, Administratrix of the estate of Robert Kirk, deceased, Appellee.

212 I.A. 646

vs.

Federal Coal Company, a Corporation, Appellant.

Appeal from the Circuit Court of Williamson County, Illinois.

McBride, J.

The appellee recovered a judgment and verdict in the Circuit court of Williamson County against the appellant for six thousand dollars, to reverse which this appeal is prosecuted.

The declaration in this case consists of two counts. The first count charges, in substance, that defendant negligently and carelessly permitted room 44 to be driven so close or near to room 43 that when a shot was fired and set off in room 43 it would as a natural consequence blow through into said room 44.

The second count charges that the defendant negligently and carelessly permitted the piller between said rooms 43 and 44 to become so thin that a blast in said piller of said room 43 when ignited would blow through into room 44 and kill any person being in said room 44.

On May 29, 1917, Robert Kirk was killed by a shot fired in room 43 off of a stub entry off of the fourth north. The stub entry extends north and south and the rooms in question extend west from this entry. The deceased was a shot firer and fired a shot in the face of room 43 and went

around into room 44 as a place of safety and when the shot discharged it blew out a portion of the pillar between rooms 43 and 44 and killed the deceased, husband of appellee.

Counsel for appellant contend that the purpose of the shot which caused the death of appellee's husband was to open up a cross-cut between rooms 43 and 44 so as to secure a circulation of air in these rooms and in room 45, and that inasmuch as said cross-cut was required by statute it was not guilty of negligence in having a thin rib between rooms 43 and 44. We cannot agree with counsel in their contention that the object to be attained in the placing and firing of a shot was to open up a cross-cut between rooms 43 and 44 but the shot was placed and fired for the purpose of knocking down coal from the face of room 43 and when the shot was fired the pillar between 43 and 44 was of the width of about three or three and a half feet, and so thin that the force of the explosion caused the pillar to break through. It appears from the record in this case that room 43 was south of room 45 and that there was a pillar of coal between rooms 43 and 45 of the width of about sixty-six feet and that for some reason not disclosed by the record room 44 was not started from the entry but was started out of room 45 at the distance of a few feet, probably from ten to fifteen feet from the entry; it was driven south the distance of sixteen to eighteen feet and was of the width of twelve or fourteen feet before it made the turn west, and was widened out as it proceeded west to the width of about eighteen or twenty feet and at the time the shot was fired room 44 had been driven in advance of room 43 the distance of about eight or ten feet. This place was known by the miners as a room and throughout the testimony was called room 44. A miner by

around [illegible]
discharged it blew out a portion [illegible]
43 and 44 and kill [illegible]

(Continued) [illegible]

the shot which [illegible]
to open up a cross-[illegible]
cure a circulation [illegible]
that [illegible]
was not guilty [illegible]
rooms 43 and 44. [illegible]
tention that the [illegible]
firing, or a wet [illegible]
43 and 44 but the [illegible]
of knocking down [illegible]
shot was fired the [illegible]
of about three or [illegible]
the force of the [illegible]
it appears is the [illegible]
south of room 43 [illegible]
rooms 43 and 44 [illegible]
for [illegible]
started [illegible]
distance of a few [illegible]
from the [illegible]
to [illegible]
left [illegible]
[illegible]
and [illegible]
in [illegible]
feet. [illegible]
throughout [illegible]

the name of Beasley was mining the coal in room 43 and on the day that appellee's husband was killed Beasley had drilled a hole from near the center of his room north to the north rib of his room and placed a shot therein. He states that the face of the room was uneven and that the shot was placed for the purpose of making a cross-cut. Robert Kirk, the husband of appellee, was a shot firer and it became his duty to fire the shot placed in room 43. He inspected the shot and found it to be a practical shot and later on he came into room 43, lighted the fuse attached to this shot and then passed out of 43 into 45 and up through 44 and was standing about ten or twelve feet east from this shot when it discharged and blew out the pillar between rooms 43 and 44 and killed him. It seems that a day or two before this the mine manager was in room 43 where Beasley was mining coal and the mine manager told him to proceed to mine in the same way and he says that he did and that he was driving his room to the west. It further appears from the evidence that rooms 43 and 44 were driven without sights that are commonly used in the mine for the purpose of determining the course that a room is being driven so as to determine whether or not the pillar between the rooms is too thin. It also appears that room 44 was not driven directly west but a little south of west, not exactly parallel with 43 and 45. It will be observed that when room 44 was turned off of room 43 and after proceeding a few feet, making a neck, the course of the room was changed to the west and the face widened to the usual width of rooms. It will also be observed that room 44 had been driven ten feet in advance of room 43, and that room 43 had been driven the distance of about thirty to thirty-five feet from the entry. No instructions had been given by the

mine manager to any one to make a cross-cut at this place. If it was intended that room 44 instead of being a room should be a cross-cut we can see no reason why they did not connect up with room 43 without mining in advance of it, as they did. It seems to us that the evidence tended to show, and the jury were warranted in finding, that rooms 43 and 44 had been so carelessly mined that they permitted the pillar to become thin and dangerous and that the mine manager ought to have seen and known that the pillar between these two rooms was unsafe. In the case of Morgan vs. Westerville Big Muddy Coal & Coke Co., 199 Ill.App.Ctr.83, this court held that where the mine had been so operated that sights were not used for the purpose of keeping the walls of the room parallel with the other rooms and that thereby the pillars had been reduced so as to become thin and dangerous that such is negligence upon the part of the operator and that the operator is liable for any damages occasioned thereby to the shot firer or other person. It is said by counsel for appellant that Kirk was an experienced shot firer and that he examined the shot placed in room 43 and pronounced it a reasonable shot. It is true this may have been a reasonable shot and in proper position for firing but we do not understand that it was the duty of the shot firer to examine the pillar between the rooms to determine whether or not it was of sufficient thickness. Indeed, some of the witnesses say that cannot be done properly except by two persons, one sounding the rib upon one side and the other listening from the other side. We do not believe that in this case Kirk was bound to know or determine for himself as a shot firer the thickness of this pillar. If the object of appellant in making this shot had been to make a hole in this pillar then

it would have by its agents directed the shot to be placed in the pillar itself, and had they done so then Kirk or any one else could have seen that the object was to blow the hole in the pillar but this shot was placed in the face of the room 43 and not placed so as to blow out the pillar between the rooms if it had been of sufficient thickness.

We do not believe that the court erred in its refusal to give a peremptory instruction as asked by appellant and we do believe that the jury was warranted in finding the defendant guilty of negligence, as charged in the declaration.

It is next insisted that the court erred in not permitting appellant to inquire of the witness Arthur Schoolcraft, on cross-examination, as follows, "You knew then that the last couple of years, Mr. Schoolcraft, that Mr. Kirk was residing in the penitentiary didn't you". The witness Schoolcraft had testified upon examination in chief that, "After Bob Kirk went to work last year he was always there on duty. I don't remember of him being off any days we were working. His scale of wages was $5.54 a shift". Counsel for appellee had only inquired of the witness as to his work after he went to work last year. We do not believe that the examination in chief was of that character to permit a cross-examination as to Kirk's work and place of confinement prior to the time inquired about by appellee. City of East Dubuque vs. Burhyte, 173 Ill.,553. The cross-examination of a witness is largely left to the discretion of the trial Judge in determining the range properly to be allowed counsel in cross-examining witnesses. C. .I.& R.Y.Co. vs. Rathburn, 190 Ill.,572. We cannot say that the court

abused this discretion in refusing to permit this cross-examination. It seems to us that the object of the question was to get before the jury the fact that deceased had been in the penitentiary. If counsel had really desired to inquire if he had been at work and supporting his family prior to the time referred to in appellee's examination then they could have asked a direct question covering that point. We do not believe that the court erred in refusing this cross-examination.

It is also said that the court erred in refusing to permit Joe Williams to answer this question, "The state supported Mr. Kirk in the penitentiary for awhile, didn't they"; counsel claim that they had the right to ask this question for the reason that the witness had stated, "Kirk made money to support his wife and children, working at the Federal Coal Company and other mines..... he gave the money he received from the Coal Company for his labor to his wife to buy grub at my house. They were living with me; living right there in the same house with me". We do not believe that the court erred in refusing to permit this question to be asked as this pertains to the support of Mr. Kirk and not to the support of the family; besides, it is apparent from the question that the object of it was the same as in the former question, to get the fact before the jury that Kirk had served a term in the penitentiary.

Counsel also insist that the court erred in not permitting them to ask the several witnesses if Kirk could have gotten to a place of safety, and other similar questions tending to show that he might have selected a more safe place than room 44. If this was permissible it would

[illegible]
[illegible]
[illegible]

only tend to show contributory negligence which the law does not permit appellant to show as an excuse for his negligence. It is urged that this was not the proximate cause. If appellant is guilty of negligence and such negligence as to cause the injury complained of then it would be liable even though the appellee may have contributed to the cause, and if the appellant was not guilty of the negligence charged and such negligence as to constitute the proximate cause to make it liable under the law then there could be no liability.

It is contended that the damages awarded are excessive. Upon the reading of the record we do not find that anything occurred during the progress of the trial to excite the passion or prejudice of the jury or that they were prompted by improper motives in rendering their verdict. It is a familiar rule that under such conditions the Appellate Court would have no right to disturb the verdict on account of the amount of damages that may have been fixed by the jury.

It is contended that the giving of the 16th instruction was error, in this, it is claimed that the instruction tells the jury that if the pillar was so thin that the place when fired blew through the same that such constituted negligence. We have read this instruction carefully and do not believe that it is subject to the criticism. It simply advises the jury that if the appellant was guilty of negligence in manner and form as charged in the declaration, and negligently permitted the pillar where the shot was fired to become too thin so that the blast when fired blew through that under such circumstances the appellee did not assume the risk. We do not believe that the criticism is well taken.

It is also insisted that the court erred in refusing defendant's refused instructions 2 and 3. Instruction 2 is erroneous from the fact that there was no evidence upon which to base the thickness of the pillar between rooms 43 and 44 as being eight or ten feet thick. Besides, if there was, the court would not have any right to tell the jury what particular thing would constitute negligence. Instruction 3 is erroneous in that it tells the jury that even if room 44 was driven near or close to room 43 this would not of itself constitute negligence. That would be a question of fact for the jury to determine whether it would or not.

It seems to us from a reading of this record that it was not the object and purpose of appellant to drive a cross-cut at the place where the injury occurred but that rooms 43 and 44 were sometimes negligently driven that they permitted the narrowing of the pillar between said rooms to such an extent as it became dangerous and by reason thereof Robert Kirk was killed.

We are of the opinion that the verdict of the jury is supported by the evidence and that there are no reversible errors in the record, and the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

It is also [illegible] in a single
defendant's refused [illegible] on [illegible]
erroneous from the [illegible]
which to base the [illegible]
and 44 [illegible]
was, the court [illegible]
particular [illegible]
is evidence in [illegible]
was driven near [illegible]
constitute negligence. [illegible]
the jury to [illegible]

It seems [illegible]
it was not the [illegible]
cross-cut at the [illegible]
rooms 41 and 44 [illegible]
the marriage of [illegible]
extent. It [illegible]
Kirk was killed.

We are [illegible]
is supported by the [illegible]
bie verdict [illegible] court
is affirmed.

Not [illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 5th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

67a

Opinion of the Appellate Court

AT AN APPELLATE COURT, Begun and held at Mt. Vernon, Illinois, on the Fourth Tuesday in the month of October in the year of our Lord, one thousand nine hundred and eighteen, the same being the 22nd day of October in the year of our Lord, one thousand nine hundred and eighteen.

Present:

Hon. Harry Higbee, Presiding Justice.
Hon. James C. McBride, Justice.
Hon. Franklin H. Boggs, Justice

CHARLES C. JOHNSON, Clerk. *THOMAS E. PASLEY, Sheriff.*

And afterwards, to-wit: On the first day of November A. D. 1918, there was filed in the office of the Clerk of said Court, at Mt. Vernon, Illinois, an OPINION in the words and figures following:

212 I.A. 646

Troy Russell,
Appellee

vs.

No. 52
March Term, 1918.

Saline County Coal Co.,
Appellant

~~ERROR TO~~
APPEAL FROM

Circuit COURT

Saline COUNTY

TRIAL JUDGE

HON. A. W. LEWIS

Term No. 52. In the Appellate Court, Agenda No.48

Fourth District.

March Term A. D. 1918.

Troy Russell, Appellee.	)	212 I.A. 646
vs.	)	Appeal from Saline County.
Saline County Coal Company, a corporation, Appellant.	)	

McBride, J.

The appellee recovered a judgment against the appellant in the Circuit Court of Saline County, Illinois, for six hundred dollars, to reverse which this appeal is prosecuted

It appears from the record in this case that the appellant was engaged in the business of operating a coal mine in said county, and that appellee was at work for it as a driver. It further appears that the appellant had elected not to operate its coal mine under the compensation laws of the State of Illinois.

On December 27, 1915, and while the appellee was engaged as mule driver for the appellant he was injured and this suit is brought to recover damages for said injury. At the time in question an old room off of the second south entry was used as a parting, known as No. 3 parting. The parting consisted of two tracks, one of the tracks being used to place the loaded cars of coal and the other track to place the empty cars to be subsequently distributed to the various working places in the mine. It was the duty of appellee to haul the empty cars from the parting to the various working

Term No. 50. In the Appellate Court, [illegible] 19.49

Fourth District.

March Term, [illegible] 1947

Troy Russell,
Appellee.

vs.

Saline County Coal Company,
a corporation,
Appellant.

21214. 949
Abstract from [illegible] Court.

McBride, J.

The appellee recovered a judgment [illegible] appellant in the circuit court of Saline [illegible], Illinois, for six hundred dollars, [illegible] instituted

It appears from the [illegible] that the appellant was engaged in the business [illegible] mine in said county, and that appellee was [illegible] a driver. It further appears that [illegible] not to operate its mine [illegible] the State of Illinois.

On December 27, 1945, [illegible] engaged as mule driver for [illegible] this suit is brought to recover [illegible] the time in question [illegible] entry was used as a [illegible] parting completely at the [illegible] to place the loaded [illegible] the empty cars [illegible] working place [illegible] haul the empty cars from [illegible]

places in the mine where the cars were loaded with coal and to haul the loaded cars from such working places back to the parting. On the morning of the day of the injury a number of empty coals cars having been previously placed on the north track in that parting, the last car or the one nearest to the bottom of the shaft, extended too far to allow a car coming on the track from the bottom towards the parting to pass on to the south track of the parting. Appellee was at this time engaged in hauling a car in to this No. 3 parting. He was driving a mule and was standing on the left hand bumper of the car and the tail chain. As he approached No. 3 parting a coal miner standing in the parting signaled him that the car on the other track at the parting protruded over the frog. Appellee immediately, and while the car was in motion, unhitched the mule leaving the car to proceed down grade into the parting by its momentum. As soon as appellee placed his hand on the mule to unhitch it the mule commenced kicking and kicked the appellee upon his knee, and just about the time that appellee reached the frog, and as the car was at or near the protruding car, in an effort to dodge the heels of the mule appellee stepped off the bumper between the tracks; the mule continued kicking and appellee still trying to evade the heels of the mule ran across the track in front of the moving car to the right and was making for the cross-cut near by to get out of the way of the kicking mule. Before he reached the cross-cut he fell down, was overtaken by the moving car and run over. The car ran over his arm breaking it, wounding and bruising him in other respects and his knee was injured by the kick received from the mule. The mule which appellee was driving was of a vicious disposition and much inclined to kick upon the least provocation, and at other

places in the mine where the cars were loaded with coal and to haul the loaded cars from such working places back to the parting. On the morning of the day of the injury a number of empty coals cars having been previously placed on the north track in that parting, the last car of the one nearest to the bottom of the shaft, extended too far to allow a car coming on the track from the bottom towards the parting to pass on to the south track of the parting. Appelles was at this time engaged in hauling a car in to the [illegible] parting. He was driving a mule and was standing on the left hand hanger of the car and the tail chain. He approached the parting a coal miner standing in the [illegible] signals in that the car on the other track at the parting protruded over the road. Appelles immediately, and while the car was in motion, unhitched the mule leaving the car to proceed down grade into the parting by its momentum. [illegible] Appelles placed his hand on the mule to unhitch it the mule commenced kicking and kicked the appelles upon the knee, [illegible] that the time that appelles reached the road, [illegible] was at or near the protruding car, in an effort to dodge the heels of the mule appelles stepped out the opposite side of the trucks; the mule continued kicking, and appelles still trying to evade the heels of the mule ran along the track in front of the moving car to the right and was running for the crossing near by to get out of the way of the kicking mule. [illegible] reached the cross-cut in [illegible] the moving car and run over. [illegible] it, wounding and bruising [illegible] was injured by the kick [illegible] which appelles was driving was [illegible] much inclined to kick upon [illegible] and at other

times without any provocation whatever, and in fact had a general reputation as being a bad kicking mule and that he had at times kicked in the presence of the officers of appellant. The entry leading into the parting was about eighteen feet wide and contained two tracks diverging from the frog, one of which was known as the loaded track and the other as the empty track. These tracks at the point of convergence at the frog were two or two and a half feet apart and gradually widened as they go farther into the parting. One track went near the left hand rib and the other near the right hand rib. On this particular morning there were ten or twelve cars standing on the left hand track of the parting and the switch was thrown for the right hand track. Near this parting, and extending up close to it, was a cross-cut which was located close to the right hand track.

The declaration consists of one count and charges that the appellant carelessly and negligently failed to use reasonable means to provide the appellee with a reasonably safe mule to drive but on the contrary provided a wild, violent, dangerous and kicking mule, and that the disposition and reputation of this mule was well known to the appellant or could have been so known by the exercise of reasonable diligence. And then avers that the appellee unhitched the mule from the car while it was in motion and that the mule began to kick at the appellee and that while he was endeavoring to escape he ran in front of the moving car and was struck by the car with great force and injured.

While several errors have been assigned by the appellant the only matter complained of, except as to the instructions, is that the injury to appellee was not caused by the kicking mule. Appellant contends that the evidence shows

times without any provocation whatever, and he left had a general reputation as being a bad kicking mule and that he had at times kicked in the presence of the witness [illegible].

The entry leading into the barrel [illegible] four [illegible] wide and contained the track diverging from the [illegible], one of which was known as the loaded track and the other as the empty track. There tracks at the point [illegible] the [illegible] were two or two and [illegible] widened as they go farther into the building. The track went near the left hand rail and the other near the right hand rail. On this particular morning there was [illegible] or twelve cars standing on the left hand or [illegible] and the switch was thrown for the right hand track. When this [illegible], and extending up close to it, was a car which was located close to the right hand track.

The description of [illegible] the [illegible] charges that the defendant carelessly and negligently failed to use reasonable means to prevent [illegible] safe mule to drive out on the track [illegible] dangerous [illegible] and reputation of this mule [illegible] or could have been [illegible] diligence. [illegible] mule from the car while [illegible] began to kick at the [illegible] by the [illegible]

[illegible] defendant the only [illegible] attractions, [illegible] the kicking mule. [illegible]

that when appellee jumped from the car and started to escape from the kicking of the mule that he reached the cross-cut and there stepped upon a rock or piece of loose coal and fell back towards the track and was injured by the car, and its contention is that as he had reached the cross-cut and as the fall was caused by stepping upon the coal that this was the proximate cause of the injury and that it was not attributable as a proximate cause to the kicking of the mule. It is true as claimed by appellant that one witness testified that appellee ran across the track into the cross-cut and there slipped and fell, and witness says that he guessed he slipped back but to the best of his knowledge he slipped and fell while in the cross-cut. Two other witnesses and the appellee testified that the appellee never reached the cross-cut but that he slipped and fell before reaching the cross-cut and while he was attempting to escape from the heels of the mule. These three witnesses of appellee testified positively that the appellee did not reach the cross-cut and that he was on the track at the time he fell. It appears to us that the kicking of the mule was the thing that placed the appellee in danger and he was attempting to escape from this danger and while doing so became injured. Even if an inanimate object contributed to the injury that would not relieve the defendant from liability if the negligence of the defendant was the efficient cause of the injury, and we think this was a question for the jury, under the facts in this case.

"In City of Joliet vs. Schufeldt, 144 Ill., 403, we deduced from the authorities the general doctrine that it was not a defense to an action for injuries occurring by reason of the negligent act of the defendant that the negligence of a third person or an evitable accident or an inanimate thing con-

tributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause and without which the injury would not have occurred". Miller vs. Kelly Coal Co., 239 Ill., 626. And in the same opinion the court further says, "Where an injury is the result of the negligence of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, the plaintiff may recover if the negligence of the defendant was an efficient cause of the injury". And even though the rock or piece of coal had contributed to the injury of the defendant, yet if the kicking of the mule was the efficient cause then the appellant could not excuse itself by saying appellee stumbled over a chunk of coal in trying to escape from the heels of the mule. Even though the gob be held to have been a concurring or intervening cause of the injury appellant would still be liable if the moving cause was that of the kicking of the mule. Miller vs. Kelly Coal Company, Supra. We are of the opinion that under the evidence as it appears in this record that it was a question of fact for the jury to determine whether or not the kicking of the mule was the efficient or proximate cause of the injury. The jury were instructed that unless the kicking of the mule was the cause of the injury that the appellee could not recover. We cannot say that the verdict of the jury was manifestly against the weight of the evidence and cannot for that reason disturb it.

It is next insisted by counsel for appellant that the court erred in the giving of instruction no. 7 and contends that this instruction directs a verdict. The instruction is as follows: "You are instructed that if you believe from the evidence that the plaintiff was a driver in the

tributed to cause the injury to the plaintiff, if the negligence of the defendant was an efficient cause and without which the injury would not have occurred". Miller vs. Kelly Coal Co., 220 Ill., 224. And in the same opinion the court further says, "Were an injury is the result of the negligence of the defendant and an inevitable accident, or an inanimate thing has contributed with the negligence of the defendant to cause the injury, he nevertheless is the negligence of the defendant was a efficient cause of the injury". And even though the rock [illegible] contributed to the injury of the defendant, yet if the injury of the mule was the efficient cause then the plaintiff should not excuse itself by saying appellee strayed over a count of land in trying to escape from the herds of the mules. Even though the rock be held to have been a concurring or contributing cause of the injury yet it would still be [illegible] the moving cause was that of the [illegible] of the [illegible]. Miller vs. Kelly Coal Company, supra. [illegible] under the evidence as it comes in [illegible] question of fact for the jury to determine [illegible] the kicking of the mule was [illegible] the injury. The jury were instructed [illegible] ing of the mule was [illegible] appellee could not recover. [illegible] the jury were [illegible] and cannot for this reason [illegible].

It is next argued [illegible] that the court erred in the [illegible] tence that this instruction [illegible] tion is as follows: "[illegible] from the evidence that the plaintiff [illegible] in the

employ of the defendant company and was injured, as averred in the declaration, and that such injury was occasioned by the kicking of the mule he was driving and that had the mule not kicked the plaintiff would not have been injured, then the kicking of the mule was the proximate cause of the injury". As we read this instruction it is simply a definition in concrete form as to what constitutes proximate cause, if it be true that the plaintiff was injured as averred in the declaration and that the kicking of the mule was the occasion of the injury, and that if the mule had not kicked the plaintiff he would not have been injured, then it seems to us under the decisions of the court in the cases above referred to of Miller vs. Kelly Coal Co., supra, and Waschow vs. Kelly Coal Company, 245 Ill., 516, that this instruction was proper and not misleading.

Complaint is made of the 9th instruction but we do not believe that the criticism is well taken as it advises the jury that if the injury of the plaintiff was proximately caused by the kicking of the mule and without such kicking the injury would not have occurred then the fact that other conditions and circumstances contributed to the injury does not keep the kicking from being the proximate cause. We see nothing wrong with this instruction and think it is in accord with the decision of the court in the Miller case above cited.

It is complained that the court erred in refusing appellant's second refused instruction. This instruction advised the jury that while the plaintiff was a competent witness his evidence should be weighed and tested the same as other witnesses, and also advised the jury that if they be-

employ of the defendant company [illegible] injured, as [illegible] in the declaration, and that [illegible] the kicking of the mule [illegible] not kicked the plaintiff [illegible] injured, when the kicking of the mule [illegible] jury". As to [illegible] tion in concerted [illegible] little cause, it be true that [illegible] injured to the declaration [illegible] the occasion of the injury, [illegible] the plaintiff [illegible] to be under the [illegible] referred to [illegible] ve. Kelly and Company, [illegible] was proper and not misleading.

[illegible] not believe that [illegible] the jury that [illegible] caused by the kicking of the [illegible] the injury which [illegible] conditions and circumstances [illegible] not keep the kicking [illegible] ser returning with the [illegible] accord with the [illegible] cited.

[illegible] upon the jury's [illegible] vised the jury that [illegible] here is a reasonable [illegible] other words, [illegible]

lieved the plaintiff or any other witness has willfully sworn falsely to any material matter then they were at liberty to disregard his testimony unless corroborated by other competent evidence. It is true, as contended, that the courts have held that it is not error to call attention to the consideration of the plaintiff's testimony as being interested in the result of the suit where the opposite party is a corporation. While it may be true that this instruction could be properly given on behalf of the defendant, but we do not regard the refusal of it as being such error as to require a reversal of the case, as the testimony of other witnesses for the appellee detailed substantially the same facts as were testified to by the appellee, and we cannot believe that the appellee was in any manner harmed by the refusal of this instruction.

It seems to us from the reading of this record that the jury were fully warranted in finding that the injury to the appellee was proximately caused by the kicking of the mule; neither do we find that any reversible error has been committed by the court in the trial of the case.

The judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

Not to be reported in full.

lieved the plaintiff or any other witness [illegible] falsely to any material matter than [illegible] disregard his testimony unless [illegible] tent evidence. It is true, as contended, that the courts have held that it is not error to call [illegible] to the consideration of the plaintiff's testimony [illegible] in the result of the suit where [illegible] portion. While it may be true [illegible] be properly given on behalf of the [illegible] request the return of it [illegible] reversal of the case, as the [illegible] the appellee detailed [illegible] testified to by the witnesses, [illegible] appellee was in any manner [illegible] instruction.

It seems to [illegible] that the jury were [illegible] to the injury to the appellee [illegible] mulgy neither do we [illegible] committed by the court [illegible]

The judgment of the lower court [illegible]

[illegible]

[illegible]

I, CHARLES C. JOHNSON, Clerk of the Appellate Court, within and for the Fourth District of the State of Illinois, DO HEREBY CERTIFY, that the foregoing is a true copy of the OPINION of the said Appellate Court in the above entitled cause of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Court at Mt. Vernon, this 7th *day of* December *A. D. 191*8.

Clerk of the Appellate Court

OPINION

FEE, $ .....

107 - 24025

JAMES F. BISHOP, Administrator, etc.,
Appellee,

vs.

LAMBERT C. WIELAND et al.,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

212 I.A. 646

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment of the Superior court of Cook county in favor of plaintiff for the sum of $4,000.

In the declaration filed by plaintiff it was charged that the defendants Lambert C. Wieland, William E. Young and George H. Young were the owners and had control and were in possession of a building known as No. 6440 Stony Island avenue, and that plaintiff's intestate, Florence L. Harris, sustained injuries from which she died as the result of the negligent manner in which defendants maintained a porch and railing thereto at said premises.

It is insisted for defendants that the court erred in permitting amendments to the original declaration and in sustaining demurrers to pleas of the statute of limitations to the declaration as amended. On September 27, 1917, the court permitted an amendment to the declaration so that the words and figures "#6440 Stony Island ave." were made to read "#6940 Stony Island ave." The original declaration also stated that Florence L. Harris died on, to-wit, the 5th day of August, 1914; the declaration was amended changing the allegation so as to charge that deceased died on the 5th day of August, 1913.

The allegation of the original declaration is that the premises in question were "commonly known as, to-wit, #6440 Stony Island avenue": this statement is alleged under a

OPINION

No. 24625

STATE F. HIGHCO, Administrator, &c.,
Appellee,

vs.

LIMBERT C. WIKLEY et al.,
Appellant.

312 I.A. 646

MR. PRESIDING JUSTICE DUNN

DELIVERED THE OPINION OF THE COURT:

This is an appeal by defendant from a judgment of the superior court of Cook county in favor of plaintiff for the sum of $4,000.

In the declaration filed [illegible] it was charged that the defendants [illegible] William Young and George H. Young were [illegible] and were in possession of a building known as [illegible] Stony Island avenue, and that [illegible] Florence I. Hertle, sustained injuries [illegible] as the result of the negligence [illegible] maintained a porch and railing [illegible].

It is insisted [illegible] defendants [illegible] erred in permitting testimony to the [illegible] and in sustaining demurrers to pleas of the statute of limitations to the declaration [illegible] 1917, the court permitted an amendment [illegible] that the words and figures [illegible] were made to read "[illegible] Stony Island Ave." [illegible] ration also asked that [illegible] the 5th day of August, [illegible] changing the allegation [illegible] on the 5th day of August, [illegible].

The allegations of the original declaration [illegible] that the premises in question were [illegible] 4040 Stony Island avenue; this statement is altered under a

videlicet, a legal action for the death of a person caused by the negligence of another is a transitory action, and hence an exact description of the place where a cause of action arises is not always an essential element of the cause of action. The case of Carlin v. City of Chicago, 262 Ill. 564, seems to be a case in point. In that case the cause of action grew out of the defective condition of a public sidewalk, and the court permitted an amendment to the declaration under which the word "place" was inserted therein in lieu of the word "street." In deciding that case the Supreme court said:

> "An action for personal injury or for negligently causing the death of another is not a local action and a description of the particular locality where the tort was committed is not an essential element of the cause of action. A declaration against a municipality which alleged all of the elements of a cause of action, and charged, in general language, that the injury happened upon one of the public streets of the municipality, without other more specific description, would state the substance of a good cause of action, and we have no doubt such a declaration would be good after verdict. The particular place where an injury occurs is not an element of the cause of action. * * * * While it is not an essential element of a cause of action for a personal injury to state with particularity the exact place where the injury was inflicted, still the rule is well established that where the pleader alleges the location he will ordinarily be held to prove the allegations made, and evidence of an injury at another time or place would be open to the objection of a variance. But the doctrine of variance is one thing and the statement of another and different cause of action is something else."

The point urged here is that the declaration as amended stated a new and different cause of action. On the authority of the Carlin case, supra, we think the point is not well taken.

In the case of Gillmore v. City of Chicago, 224 Ill. 490, the place where the cause of action arose was an element that, in some degree, aided in determining the degree of care required of the parties. We do not think that this element was at all important in the present case. The duty imposed by law to keep the building in question in a safe and

validity, a legal action for the death of a person caused by the negligence of another is a statutory action, and hence an exact description of the place where a cause of action arises is not always an essential element of the cause of action. The case of Curtin v. City of Chicago, 264 Ill. 564, seems to be a case in point. In that case the cause of action grew out of the defective condition of a public sidewalk, and the court permitted an amendment to the declaration under which the word "place" was inserted therein in lieu of the word "street." In deciding that case the Supreme Court said:

"An action for personal injury or for negligently causing the death of another is not a local action and a description of the particular locality where the tort was committed is not an essential element of the cause of action. A declaration against a municipality which alleged all of the elements of a cause of action and charged, in general language, that the injury occurred upon one of the public streets of the municipality, without other more specific description, would state the existence of a good cause of action, and we have no doubt such a declaration would be good after verdict. The particular place where an injury occurs is not an element of the cause of action. * * * While it is not an essential element of a cause of action for a personal injury to state with particularity the exact place where the injury was inflicted, still the rule is well established that where the pleader alleges the location he will ordinarily be held to prove the allegations made, and evidence of an injury at another time or place would be open to the objection of a variance. But the doctrine of variance is one strictly and the statement of another and different cause of action is something else."

The point urged here is that the declaration as amended stated a new and different cause of action. In the authority of the Curtin case, supra, on this point is not well taken.

In the case of Gilmore v. City of Chicago, 224 Ill. 490, the place where the cause of action arose was an element that, in some degree, aided in determining the degree of care required of the parties. We do not think that this element was at all important in the present case. The duty imposed by law to keep the building in question in a safe and

proper condition for persons rightfully in or upon them existed irrespective of its location.

Nor do we think that the court erred in permitting the amendment which stated the death of Florence L. Harris as having occurred August 5, 1913, instead of August 5, 1914, as alleged in the original declaration. The date of death was alleged under a videlicet. The allegation in the original declaration was plainly a clerical error.

It is urged that the declaration even as amended fails to state a cause of action; that no facts are charged to show that Florence L. Harris, the deceased, was a member of the family of the tenant in possession of the premises, or that she was a guest of the tenant in possession of the premises, and that no facts are alleged from which the law raised any duty on the part of defendants to protect her. A declaration is not sufficient which merely alleges generally the duty of a defendant.

In the case of Bahr v. National Safe Deposit Company, 234 Ill. 101, the Supreme court said:

> "It is not stated why the deceased was upon the premises. For aught that appears he may have been a trespasser. The original declaration was, therefore, wholly insufficient to support a judgment because of the absence of an averment showing the existence of a duty on the part of appellee to protect appellant's intestate from the injury complained of."

It may be assumed that the law imposes no legal duty upon the owner of premises to keep them in good and safe condition and free from pitfalls or the like in favor of those who use such premises for their own convenience as mere licensees.

The declaration charges that:

> "Florence L. Harris, during her lifetime, was lawfully, at the invitation and direction of the defendants and each of them, in and upon the said second porch or platform," etc.

proper condition for [illegible] fully [illegible] [illegible] lated irrespective of the [illegible].

Nor do we find [illegible] [illegible] ting the amendment which [illegible] of [illegible]. Harris as having occurred [illegible], later, [illegible] of [illegible] 3, 1914, as alleged in the [illegible] indictment. [illegible] of death was alleged under a [illegible]. [illegible] the original declaration [illegible] error.

[illegible] amended fails to state a [illegible] of [illegible] charged to show that [illegible], [illegible], [illegible] a member of the family of [illegible] person [illegible] sea, or that he was a guest [illegible] premises, and that no [illegible] from which the law relaxed any duty on the part of defendant to protect her. A declaration is not sufficient [illegible] generally the duty of a defendant.

In the case of [illegible] v. [illegible] [illegible] [illegible] 234 Ill. 2 1, the [illegible] court said:

> "It is not stated [illegible] the premises. Nor might that a [illegible] trespasser. The [illegible] wholly insufficient to support a [illegible] the absence of an express [illegible] duty on the part of [illegible] to protect [illegible] licensee from the injury [illegible]."

It may be [illegible] duty upon the owner of [illegible] condition and free from [illegible] those who use such [illegible] mere licensees.

The declaration [illegible]:

> "Reference [illegible] lawfully, at the invitation [illegible] and each of them, [illegible] or platform," etc.

It is further charged in the declaration that it was the duty of defendants to protect deceased from a defective and dangerous condition of said premises, and it was also alleged therein that the second porch of the premises where the accident occurred, and the railings and balusters thereof, were used for the protection of the tenants and guests and whoever might be in and upon the building. It was the legal duty of the owner of the premises to keep them and the porch thereof in a reasonably safe condition for the tenants in possession of the premises, their families and guests and other persons having a legal right to go in or upon them. The allegation is that deceased was there at the invitation and suggestion of the defendants. The evidence shows that she was in fact a granddaughter of the tenant of the premises; that some time after the letting of the premises deceased and her parents came to live with the family of the tenant. The evidence does not disclose that deceased was invited to the premises by defendants or either of them, and her presence there was the result of her relationship to the tenant. This relationship, while shown by the evidence, is not alleged in the declaration. The fact is, as shown by the evidence, she was on the premises at the invitation of the tenant. The declaration alleges that she was there at the invitation of defendants, and it is sought to support this allegation by proof of the relationship referred to.

In Casey v. Adams, 137 Ill. App. 404, the court said:

> "The gravamen of the claim of plaintiff in error as set forth in the declaration is that the deceased was not a trespasser or naked licensee, but was on the premises at the invitation, express or implied, of the tenant of defendant in error, and that by reason of the failure of defendant in error to provide a barrier for the doorway or a light in the shaft, the deceased failed to see where the shaft was, and as a result fell into it."

This case is relied upon by plaintiff. It will

It is further charged in the declaration that it was the duty of defendants to protect deceased from a defective and dangerous condition of said premises, and it was alleged therein that the second porch of the premises where the accident occurred, and the railings on, belonging thereof, were used for the protection of the tenants and guests and whoever might be in and upon the building. It was the legal duty of the owner of the premises to keep them and the porch thereof in a reasonably safe condition for the tenants in possession of the premises, their families and guests and other persons having a legal right to go in or upon them. The allegation is that deceased was there on the invitation and suggestion of the defendants. The evidence shows that she was in fact a granddaughter of the tenant of the premises; that some time after the letting of the premises deceased and her parents came to live with the family of the tenant. The evidence does not disclose that deceased was invited to the premises by defendants or either of them, and her presence there was the result of her relationship to the tenant. This relationship, while shown by the evidence, is not alleged in the declaration. The fact is, as shown by the evidence, she was on the premises at the invitation of the tenant. The declaration alleges that she was there at the invitation of defendants, and it is sought to sustain this allegation by proof of the relationship referred to.

In Causey v. Adams, 107 Ill. App. 474, the court said:

> "The gravamen of the claim of plaintiff in error as set forth in the declaration is that the deceased was not a trespasser or mere licensee, but was on the premises at the invitation, express or implied, of the tenant of defendant in error, and that by reason of the failure of defendant in error to provide a barrier for the doorway or a light in the entry, the deceased fallen to see where the shaft was, and as a result fell into it."

This case is relied upon by plaintiff. It will

be noted from the language quoted above that the charge in the declaration in the above case was that deceased was on the premises at the invitation of the tenant of the defendant. In the instant case the allegation is that the deceased was on the premises at the invitation of defendants and, as stated, this allegation was not expressly supported by the proof.

The question under discussion here has been the subject of numerous decisions; some of these cases are referred to in the Casey case, supra. In its opinion the court said:

> "Thus it was held in I. C. R. R. Co. v. Hopkins, 200 Ill. 122, that the fact that the plaintiff had been accustomed for a number of years to go upon the premises and deliver meals to the mail clerks was a sufficient invitation to warrant her being there."

We are inclined to agree with certain of the authorities that one is not a trespasser or licensee who uses premises for a purpose which was within the ordinary use by the tenant of such premises, and while this question does not seem to be free from all doubt, we are inclined to hold after verdict that any member of a tenant's family is in possession of the premises leased by either the express or implied invitation of the owner of such premises. It is quite true, as urged, that deceased was not a member of the tenant's family at the time the premises were leased, but there was no agreement in the lease or otherwise that the personnel of the family of the tenant was to remain unchanged during the term. The evidence shows that deceased was in fact a member of the tenant's family at the time the accident occurred, and we think that the allegation in the declaration that she was there by invitation of defendants, in the present state of the record, is sufficient.

The case of McAndrews v. C. I. S. & M. Ry. Co.,

be noted from the language quoted above that the charge in the declaration in the above case was that deceased was on the premises at the invitation of the tenant of the defendant. In the instant case the allegation is that the deceased was on the premises at the invitation of defendants and, as stated, this allegation was not expressly supported by the proof.

The question under discussion here has been the subject of numerous decisions; some of these cases are referred to in the Geary case, supra. In its opinion the court said:

> "Thus it was held in L. & N. R. R. Co. v. Porter, 200 Ill. 122, that the fact that the plaintiff had been accustomed for a number of years to go upon the premises and deliver meals to the wife of one was a sufficient invitation to warrant her being there."

We are inclined to agree with certain of the authorities that one is not a trespasser or licensee who uses premises for a purpose which was within the ordinary use by the tenant of such premises, and while this question does not seem to be free from all doubt, we are inclined to hold after verdict that any member of a tenant's family is in possession of the premises leased by either the express or implied invitation of the owner of such premises. It is quite true, as urged, that deceased was not a member of the tenant's family at the time the premises were leased, but there was no agreement in the lease or otherwise that the personnel of the family of the tenant was to remain unchanged during the term. The evidence shows that deceased was in fact a member of the tenant's family at the time the accident occurred, and we think that the allegation in the declaration that she was there by invitation of defendants, in the present state of the record, is sufficient.

The case of Vandrewe v. C., C. & I. Ry. Co.,

222 Ill. 232, and other cases relied upon by defendants are not in point. The declaration here is that the deceased was on the premises at the invitation of the defendants; there is some proof tending to support this allegation. Sargent Co. v. Baublis, 215 Ill. 428.

The evidence in the case shows that deceased came to her death by reason of falling from the second rear porch of the premises. There is some conflict in the evidence as to the cause of the accident. Deceased was about two years of age when the accident occurred. Several witnesses testify to the rotten and unsafe condition of the railing attached to the porch from which she fell. There is some evidence in contradiction of this testimony, but the question of defendant's negligence was, clearly, on the record, one of fact for the jury. Deceased's father testified that he knew of the defective and rotten condition of the railing for some time before the accident, and that he had warned his wife, deceased's mother, to protect the child. There is evidence to the effect that the mother of deceased did not otherwise knew of the condition of the porch; that on the day of the accident she left the child on the porch in charge of a girl about twelve years of age. On the whole evidence the question of the parents' negligence was properly left to the decision of the jury. I. C. Ry. Co. v. Warner, 229 Ill. 93.

It is insisted that the trial court erred in its refusal on motion to dismiss the defendants William K. Young and George H. Young out of the case at the close of plaintiff's evidence and at the close of all the evidence introduced on the trial. We think this motion should have been allowed. While there is some slight proof that these two defendants held themselves out as owners of the premises in

222 Ill. 232, and other cases relied upon by defendants are not in point. The declaration here is that the deceased was on the premises at the invitation of the defendants; there is some proof tending to support this allegation.

Barrett Co. v. Hamblin, 214 Ill. 424.

The evidence in the case shows that deceased came to her death by reason of falling from the second rear porch of the premises. There is some conflict in the evidence as to the cause of the accident. Deceased was about two years of age when the accident occurred. Several witnesses testify to the rotten and unsafe condition of the railing attached to the porch from which she fell. There is some evidence in contradiction of this testimony, but the question of defendant's negligence was, clearly, on the record, one of fact for the jury. Deceased's father testified that he knew of the defective and rotten condition of the railing for some time before the accident, and that he had warned his wife, deceased's mother, to protect the child. There is evidence to the effect that the mother of deceased did not otherwise know of the condition of the porch; that on the day of the accident she left the child on the porch in charge of a girl about twelve years of age. On the whole evidence the question of the parents' negligence was properly left to the decision of the jury. Lake Erie & W. R. R. Co. v. Farmer, 229 Ill. 93.

It is insisted that the trial court erred in its refusal on motion to dismiss the defendants William v. Young and George R. Young out of the case at the close of plaintiff's evidence and at the close of all the evidence introduced on the trial. A third thing more it would have been allowed. While there is some direct proof that these two defendants held themselves out as owners of the premises in

question, on the whole evidence it is clear that they were only the agents of the defendant, Lambert C. Wieland, the owner thereof. It is sought by plaintiff's counsel to sustain the judgment against these defendants on the theory that the premises were leased to the tenant with a nuisance thereon at the time of the letting. The declaration, however, charges all of the defendants as owners of the premises. The allegation is that "the defendants, and each of them, were the owners, had control and were in possession of, and were using and operating a certain building," and that "the defendants, and each of them, had constructed, made, or caused to be made, kept and maintained in the rear of said building * * * a certain platform, porch and stairways"; it was also alleged that it became and was the duty of the defendants, and each of them, to keep the premises and balustrade and railings and other parts of the porch and stairways in a safe and proper condition. The declaration does not charge the defendants William K. Young and George H. Young as agents and no allegation is contained therein that as agents for the premises these two defendants rented them to the tenant with a nuisance thereon. A plea of the general issue was filed by each of the defendants and William K. Young and George H. Young filed special pleas denying ownership or control of the premises. The evidence shows that the Youngs were merely the agents of the owner of the premises, and we think that the declaration should have charged them with this relationship and that they rented the premises with a nuisance thereon. Ordinarily, an agent is liable to his principal only for any neglect on the part of the agent to perform the duties imposed upon him by his contract with the principal. This general principle is, however, subject to exceptions and it has been held that where an agent is intrusted with machinery or appliances that are

question, on the whole evidence it is clear that they were only the agents of the defendant, Robert J. Leland, the owner thereof. It is sought by plaintiffs counsel to sustain the judgment against these defendants on the theory that the premises were leased to the tenant with a nuisance thereon at the time of the letting. The declaration, however, charges all of the defendants as owners of the premises. The allegation is that "the defendants, and each of them, were the owners, had control and were in possession of, and were using and operating a certain building," and that "the defendants, and each of them, had constructed, made, or caused to be made, kept and maintained in the rear of said building . . . a certain platform, porch and stairways"; it was also alleged that it became and was the duty of the defendants, and each of them, to keep the premises and platforms and building and other parts of the porch and stairways in a safe and proper condition. The declaration does not charge the defendants William K. Young and George H. Young as agents and no allegation is contained therein that as agents for the premises these two defendants rented them to the tenant with a nuisance thereon. A plea of the general issue was filed by each of the defendants and William K. Young and George H. Young filed special pleas denying ownership or control of the premises. The evidence shows that the judge were merely the agents of the owner of the premises, and we think that the declaration should have charged them with this relationship and that they rented the premises with a nuisance in fact. Further, an agent is liable to his principal only for any neglect on the part of the agent to perform the duties imposed upon him by his contract with the principal. This general principle is, however, subject to exceptions and it has been held that where an agent is intrusted with machinery or appliances that are

inherently dangerous he will be held liable to a third person injured thereby where such agent has not exercised proper care in the management and control of such instrumentalities. This liability of the agent is based upon "his common law obligations to so use that which he controls as not to injure others. That obligation is neither increased nor diminished by his entrance upon the duty of the agency, nor can its breach be excused by the plea that his principal is chargeable." Baird et al v. Shipman, 132 Ill. 16. The declaration does not charge, as contended by counsel for plaintiff, that parts of the premises in question were under the direct control, operation and management of the defendants and each of them. The allegation of the declaration, as it appears on page 2 of the abstract, is that the premises "were under direct control, ownership, operation and management of the said defendants, and each of them."

The very essence of the claim against the Youngs is that they were liable to plaintiff because they were in control of the premises as agents and had rented them with a nuisance thereon; as to them proof of these facts was necessary before judgment could be rendered against them. "A declaration which fails to state a fact whose existence is necessary to entitle the plaintiff to recover does not state a cause of action." Beveridge v. Illinois Fuel Company, 283 Ill. 31; Sargent Co. v. Baublis, 215 Ill. 428.

While it may be true, as asserted, that the Youngs were not excused from liability to plaintiff by the mere fact that they were agents of the owner, it was necessary to allege and prove that their liability did arise out of their relationship to the premises. The connection and relationship charged is that of ownership and this charge is not supported by the evidence.

inherently dangerous he will be held liable to a third person injured thereby where such agent has not exercised proper care in the management and control of such instrumentalities. This liability of the agent is based upon the common law obligation to so use that which he controls as not to injure others. That obligation is neither increased nor diminished by his entrance upon the duty of the agency. He can use the beast be owned by the plea that his principal is responsible."

Baird et al v. Shipman, 152 Ill. 16. The declaration here not charge, as contended by counsel for plaintiff, that parts of the premises in question were under the direct control, operation and management of the defendants and each of them. The allegation of the declaration, as it appears on page 8 of the abstract, is that the premises were under direct control, ownership, operation and management of the said defendants, and each of them."

The very reason of the claim against the Young is that they were liable to plaintiff because they were in control of the premises as owners and renters. It is a nuisance thereon; as to them proof of those facts was necessary before judgment could be rendered against them. The declaration which fails to state a fact whose existence is necessary to entitle the plaintiff to recover does not state a cause of action." Everidge v. Illinois Coal Company, 253 Ill. 21; Sargent Co. v. Annis, 15 Ill. 476.

While it may be true, as a matter, that the Youngs were not excused from liability to plaintiff by the mere fact that they were agents of owners, it is necessary to allege and prove that their liability arises out of their relationship to the premises. The connection and relationship charged is that of a mortgagee. This charge is not supported by the evidence.

While other questions are argued we think no other reversible error was committed in the trial of the cause.

For the error of the court in refusing to dismiss the cause as to the defendants William K. Young and George H. Young, the judgment of the trial court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

While other questions are argued we think no other reversible error was committed in the trial of the cause.

For the error of the court in refusing to sustain the demurrer as to the defendants William J. Young and George H. Young, the judgment of the trial court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

160 - 24080

160 - 24080

BIRD-SYKES COMPANY,
a corporation,
Appellee,

vs.

PAUL W. SCHROEDER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

212 I.A. 646

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal court in favor of plaintiff.

On January 31, 1913, Adolph G. Beisler executed and delivered to plaintiff a promissory note for the sum of $900. Before delivery of the note to plaintiff the defendant placed his name on the back thereof as an accommodation endorser. After the delivery of the note to plaintiff, the maker thereof, Adolph G. Beisler, informed plaintiff's president and treasurer that he desired to pay the note in installments instead of waiting until its maturity and thereupon the following agreement was endorsed upon the back of the note and signed by Adolph G. Beisler and Charles F. Beisler:

> "I hereby agree to make monthly payments on account of this note of $100 per month starting March 30th, 1913."

A judgment was taken on the note against Adolph G. Beisler in the Municipal court December 3, 1914, under a warrant of attorney. Neither the judgment nor the note has been paid. The note fell due on Saturday and on the Monday following, being February 2, 1914, an agent of plaintiff attempted to present the note for payment at Adolph G. Beisler's residence in Chicago. This agent testified that he presented the note at No. 1204 North Sawyer

I60 - 24080

BIRD-BYRNE COMPANY,
a corporation,
Appellee,

vs.

PAUL W. SCHROEDER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

21 21 I.A. 646

MR. PRESIDING JUSTICE DYER
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Municipal court in favor of plaintiff.

On January 31, 1913, Adolph G. Meister executed and delivered to plaintiff a promissory note for the sum of $900. Before delivery of the note to plaintiff the defendant placed his name on the back thereof as an accommodation endorser. After the delivery of the note to plaintiff, the maker thereof, Adolph G. Meister, informed plaintiff's president and treasurer that he desired to pay the note in instalments instead of waiting until its maturity and thereupon the following agreement was endorsed upon the back of the note and signed by Adolph G. Meister and Charles Y. Meister:

> "I hereby agree to make monthly payments on account of this note of $100 per month starting March 30th, 1913."

A judgment was taken on the note against Adolph G. Meister in the Municipal court December 3, 1914, under a warrant of attorney. Neither the judgment nor the note has been paid. The note fell due on Saturday and on the Monday following, being February 2, 1914, an agent of plaintiff attempted to present the note for payment at Adolph G. Meister's residence in Chicago. This agent testified that he presented the note at No. 1404 North Lawler

avenue; later in his testimony he corrected this statement by saying that he presented the note at No. 1244 Sawyer avenue. He testified further that the name "Beisler" appeared on a small card at the entrance to the premises; that he was unable to gain admittance to the house or to present the note to Beisler; that he then informed Schroeder of his inability to present the note to Beisler and that defendant had stated to the witness that Beisler had a tea and coffee route and was out most of the time during the day; that he, defendant, knew where Beisler could be found and that he would see him, tell him about the note and try to get him to pay it.

The jury found the issues for the plaintiff and the defendant insists here that the court erred in not giving a peremptory instruction for the defendant, for the reason that no showing was made of due presentment of the note to the maker for payment, and that further, the defendant, as endorser, was discharged of liability because the payee and maker of the note had materially altered it without his, defendant's, consent.

The evidence heard upon the trial tends to prove that the plaintiff made an effort to present the note for payment to the maker thereof. No place for payment or for presentation of the note is designated in the note itself. Under Section 82 of the Illinois Negotiable Instruments Law the presentation of a note when due to the maker thereof is dispensed with when such presentation cannot, after reasonable diligence, be made, and also an endorser of a note may, under this section, waive the presentation of such note. So far as the record shows, the agent of plaintiff made some effort to find Adolph G. Beisler and to present the note to him for payment, and while his testimony is somewhat vague as to his knowledge of

avenue; later in his testimony he [illegible] by saying that he presented the note at [illegible] mue. He testified further that the name "Daisley" appeared on a small card at the entrance [illegible] unable to gain admittance [illegible] note to Beisler; that he [illegible] ability to present the note to Beisler [illegible] stated to the witness that Beisler [illegible] and was out most of the time during [illegible] fendant, knew where Beisler could be [illegible] see him, tell him about the note and try to [illegible] it.

The jury found the issues for [illegible] the defendant insists here that the court [illegible] a peremptory instruction for the defendant, [illegible] that no showing was made of due presentment [illegible] the maker for payment, and that [illegible] endorser, was discharged if [illegible] maker of the note had materially altered [illegible] fendant's consent.

The evidence [illegible] that the plaintiff made an effort to [illegible] ment to the maker thereof. [illegible] tation of the note is [illegible] tion 82 of the Illinois [illegible] tation of a note when due to the maker thereof [illegible] when such presentation cannot, after [illegible] made, and also an concurrence of a [illegible] waive the presentation of such note. [illegible] shows, the agent of plaintiff made some [illegible] C. Beisler and to present the note to [illegible] while his testimony is [illegible] to his knowledge of

Beisler's place of residence, we think, on the whole record, that there was some evidence of an attempt on the part of plaintiff to present the note; whether due diligence was used by plaintiff in this attempt was, on the evidence, a question of fact for the determination of the jury. There is evidence to the effect that the defendant said he knew when and where he could find Beisler and that he would see him and endeavor to get him to pay the note. There is some evidence in the record tending to prove diligence in the presentation of the note and also that the defendant himself, by his promise to see Beisler and inform him of the demand for payment of the note, waived any right which he might have had to require more diligent efforts on the part of the plaintiff to present the note to Beisler.

1 Parsons on Notes and Bills, 582.

> "Demand and notice may be waived by an act of the indorser calculated to put the holder off his guard, and prevent him from treating the note as he otherwise would have done."

A more difficult question is presented when we come to consider the point made by defendant that by a subsequent agreement the original contract was altered by the maker and the payee of the note, without defendant's consent. It is conceded that the agreement for the payment of the note in monthly installments was placed upon the back of the note after its endorsement by defendant. Defendant insists that the alleged alteration releases him from his liability on the original contract; that the agreement changed the original contract from a sole obligation of the maker to the joint and several obligations of Adolph G. Beisler and Charles T. Beisler, and also that the agreement changed the time of payment of the note. The making of the original note and the endorsement thereof by defendant con-

Belaier's place of residence, as taken, on the whole record, that there was some evidence of an effort on the part of plaintiff to present the note; whether the diligence was used by plaintiff in this attempt was, on the evidence, a question of fact for the determination of the jury. There is evidence to the effect that the defendant said he knew when and where he could find Belaier and that he would see him and endeavor to get him to pay the note. There is some evidence in the record tending to prove diligence in the presentation of the note and also that the defendant himself, by his promise to see Belaier and inform him of the demand for payment of the note, waived any right which he might have had to require more diligent efforts on the part of the plaintiff to present the note to Belaier.

I Parsons on Notes and Bills, 542.

"Demand and notice may be waived by an act at the indorser calculated to put the holder off his guard, and prevent him from treating the note as he otherwise would have done."

A more difficult question is presented when we come to consider the point made by defendant that by a subsequent agreement the original contract was altered by the maker and the payee of the note, without defendant's consent. It is conceded that the agreement for the payment of the note in monthly installments was placed upon the back of the note after its endorsement by defendant. Defendant insists that the alleged alteration releases him from his liability on the original contract; that the agreement changed the original contract from a note payable on demand by the maker to the joint and several obligations of Joseph Belaier and Charles T. Belaier, and that the agreement changed the time of payment of the note. The rule is that if the original note and the endorsement thereof by defendant con-

stituted a valid and binding contract between the parties thereto and it is insisted by plaintiff that the subsequent agreement, being without consideration, was unenforceable and did not therefore alter the contract originally entered into.

In Miller v. Stewart, 9 Wheat. 680, the court said:

> "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal."

Section 124 of the Illinois Negotiable Instruments Law provides:

> "Any alteration which changes the date, the sum payable, either for principal or interest, the time or place of payment, the number and relations of the parties * * * * or any other change or addition which alters the effect of the instrument in any respect is a material alteration."

In Heldman v. Gunnell, 201 Ill. App. 172, relied upon by defendant, the court held that a written agreement attached to a promissory note which extended the time of payment of the note by providing that it might be paid at the rate of $50 a month, constituted a material alteration of the contract of the parties; the attached agreement was executed concurrently with the note, and the court held that it therefore became a part thereof, and together with the note constituted the contract of the parties. These are cases and text authorities to the effect that a surety may be released by the alteration of a contract, even where it appears that the alteration operated to the benefit of the surety. Johnston v. May, 72 Ind. 239; Daniel, N. I.

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In Miller v. Stewart, 9 Wheat. 680, the court said:

> "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. In the extent and in the manner and under the circumstances pointed out in his obligation he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is void."

Section 124 of the Illinois Negotiable Instruments Law provides:

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In Heilman v. Gunnell, 201 Ill. App. 172, relied upon by defendant, the court held that a written agreement attached to a promissory note which extended the time of payment of the note by providing that it might be said at the rate of $50 a month, constituted a material alteration of the contract of the parties; the extended agreement was executed concurrently with the note, and the court held that it therefore became a part [illegible] together with the note constituted the contract [illegible] parties. There are cases and text authorities to the effect that a surety may be released by the alteration of a contract, even where it appears that the alteration operated to the benefit of the surety. Johnston v. May, 72 Ind. 529; Daniel, N. I.

Sec. 151. Counsel for plaintiff has not called our attention to any case or authority which tends to show that the alteration here complained of was immaterial.

Was the subsequent agreement which was placed on the back of the note without consideration? Was it collateral to the note and was it unenforceable as against Adolph G. Beisler and Charles F. Beisler? The plaintiff insists that this agreement was without consideration; that it was unenforceable and therefore did not in any way alter the original contract. The agreement between the maker of the note and the Beislers did not on its face purport to waive any interest that might become due under the original contract. Adolph G. Beisler, the maker of the note as it was originally drawn, was legally required to pay the note only when it became due. The agreement referred to shows a promise on his part to meet his original obligation at a different and earlier time. His promise to pay the note in monthly installments is not supported by any promise of the plaintiff other than his implied agreement to receive the payments. If this subsequent agreement is supported by sufficient consideration and is enforceable against Adolph G. Beisler, then, ipso facto, it changes the original contract and the surety would thereby be released therefrom. The subsequent agreement was not contemporaneous with the making and delivery of the original contract; it was made and entered into some days after the delivery of the note to plaintiff and it cannot therefore be said to be a part of the original contract.

Our attention has been called to cases which hold, as stated, that agreements modifying contracts, even in cases where a surety is benefitted, thereby releases the surety from such contracts; but these are cases where a

See, 131. Counsel for plaintiff has not called our atten-
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alteration here complained of was immaterial.

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it was unenforceable and therefore did not in any way alter
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the note and the Beislers did not on its face purport to
waive any interest that might become due under the original
contract. Adolph G. Beisler, the maker of the note as it was
originally drawn, was legally required to pay the note only
when it became due. The agreement tended to show a
promise on his part to meet his original obligation at a
different and earlier time. His promise to pay the note in
monthly instalments is not supported by any promise of the
plaintiff other than his implied agreement to receive the
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Beisler, then, ipso facto, it changes the original contract
and the surety would thereby be released therefrom. The
subsequent agreement was not contemporaneous with the
making and delivery of the original contract, it was made
and entered into some days after the delivery of the note
to plaintiff and it cannot therefore be said to be a part
of the original contract.

Our attention has been called to cases which
hold, as stated, that extensions granting creditors, even
in cases where a surety is considered, always release the
surety from such contracts; but these are cases where a

modification was made concurrently with the execution of the original agreement and hence became a part of the original contract, as for instance in the case of Heldman v. Gunnell, 201 Ill. App. 172, where a memorandum attached to a note at the time of its execution was detached therefrom. Section 24 of the Illinois Negotiable Instruments Law provides in effect that consideration will be presumed as to every person whose signature appears upon commercial paper. The subsequent agreement, even though it appears on the back of a negotiable instrument, does not in our opinion render it commercial paper within the purview of Section 24 of the act. In and of itself the agreement was not, as we have stated, an enforceable part of the original note, and it is therefore, in the eye of the law, not a part thereof. The promise of Adolph G. Beisler to pay the note in installments before it becamedue is unsupported by a consideration.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

modification was made concurrently with the execution of the original agreement and hence became a part of the original contract, as for instance in the case of Goldman v. Gunnell, 203 Ill. App. 172, where a memorandum attached to a note at the time of its execution was declared therefrom. Section 24 of the Illinois Negotiable Instruments Law provides in effect that consideration will be presumed as to every person whose signature appears upon commercial paper. The endorsement agreement, even though it appears on the back of a negotiable instrument, does not in our opinion render it commercial paper within the purview of section 24 of the act. In and of itself the agreement was not, as we have stated, an enforceable part of the original note, and it is therefore, in the eye of the law, not a part thereof. The promise of Adolph G. Reifler to pay the note in instalments before it becomes due is unsupported by a consideration. The judgment of the municipal court will be affirmed.

AFFIRMED.

169 - 24090

R. L. HURLBURT and FRANK KOEPKE,
Appellees,

vs.

LOUIS F. HOPKINS and GEORGE K. HOLLINGSWORTH,
Appellants.

212 I.A. 647

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiffs brought suit in the Municipal court of Chicago against Louis F. Hopkins and George K. Hollingsworth to recover a judgment for commissions and services rendered as real estate agents in bringing about an exchange of real estate between defendants and one Hulda Antler. The suit was originally brought by the plaintiff R. L. Hurlburt. By an amended statement of claim Frank C. Koepke was made an additional party plaintiff. On a trial of the issues a judgment was entered in favor of the plaintiffs for the sum of $1,000, and by this appeal the defendants seek to reverse this judgment.

On behalf of the defendants it is insisted that the verdict was manifestly against the weight of the evidence introduced on the trial and that plaintiffs were not duly licensed by the City of Chicago to carry on a real estate brokerage business. The evidence which is in some respects conflicting tends to show that one Perlman, for sometime employed as a salesman by plaintiffs, who are regularly licensed real estate brokers, introduced the plaintiff Hurlburt to the defendant Hopkins, also in the real estate business and who had a certain parcel of real estate which he had informed Perlman he desired to sell.

189 - 24090

R. L. HOLLINGS and FRANK
KOZEKE,
Appellees,

vs.

LOUIS F. HOFKINS and
GEORGE K. HOLLINGSWORTH,
Appellants.

MR. PRESIDING JUSTICE DIETZ

DELIVERED THE OPINION OF THE COURT.

The plaintiff in error [illegible]
court of Cuyahoga against [illegible]
Hollingsworth to recover [illegible]
services rendered in [illegible]
an exchange of real [illegible]
Hulda Antler. The [illegible]
plaintiff [illegible]
claim Frank C. [illegible]
tiff. On a trial of the [illegible]
favor of the plaintiff [illegible]
this appeal the defendants [illegible]

On behalf of the [illegible]
that the verdict was [illegible]
evidence introduced [illegible]
not duly licensed [illegible]
real estate brokers [illegible]
some respects [illegible]
for somewhat [illegible]
regularly licensed real [illegible]
plaintiff [illegible]
real estate business [illegible]
estate which [illegible]

21210.647

The parties had met at a bank for the purpose of arranging a second mortgage transaction in which they were interested. Hurlburt testified that the defendant Hopkins stated to him in substance that he, Hopkins, would like to have Perlman dispose of the premises for him and if possible to arrange a deal for the exchange of the properties between him, Hopkins, and a Mrs. Antler. The evidence shows that Mrs. Antler was a client of plaintiffs.

Hurlburt's testimony is corroborated by that of Perlman, who testified that on a prior occasion Hopkins had said to him that he had several pieces of property which he wished to either sell or exchange, and that he, Hopkins, submitted property located at Leland and Winchester avenues, at the same time giving his card to the witness and saying to him, "If I could do anything for him why he would be glad to work with us;" that he, the witness, told Hopkins that he was in the employ of plaintiff and that he gave him plaintiff's business card. Perlman also testified that two days after the latter conversation he informed Mrs. Antler of Hopkins' desire to exchange his property and that she requested him to show her the building; that he, the witness, called on Hopkins the same day and informed him of Mrs. Antler's interest in the proposal; that Hopkins then said that if a suitable arrangement could be made he probably would be interested; that Hopkins called up persons living on the premises, requesting them to permit the witness and Mrs. Antler to view the property; that on the following day the witness and Mrs. Antler examined the premises and that Mrs. Antler said she would entertain a deal if it could be made along lines which she thought were right; that subsequently, on the same day, she made a definite

The parties had met at a bank for the purpose of arranging a second mortgage transaction in which they were interested. Murphurt testified that the defendant Hopkins spoke to him in substance that he, Hopkins, would like to have someone dispose of the premises for him and if possible to arrange a deal for the exchange of the properties between Hopkins, and a Mrs. Antler. The witness knew that Mrs. Antler was a client of plaintiff.

Murphurt's testimony is corroborated by that of Perlman, who testified that in a prior conversation Hopkins had said to him that he had several pieces of property which he wished to either sell or exchange, and that Mr. Hopkins, submitted property located at Hunnewell Avenue, at the same time giving his card to him with the name and address to him, "If I could do anything for him in the real estate to work with me;" that he, the witness, said, upon the that he was in the employ of plaintiff and he gave the plaintiff's business card. Perlman testified that two days after the latter conversation he in person, Mr. Antler of Hopkins' desire to exchange his property and that he requested him to show his business, the witness, called on Hopkins the same day and informed him of the Antler's interest in the property. Perlman said that if a suitable exchange could be made he would be interested; that Hopkins said he would be on the premises, requesting him to bring the Antlers and Mrs. Antler to view the property. Perlman testified that the day the witness saw Mrs. Antler she said the price was that Mrs. Antler said she could entertain a deal if it could be made along lines which she thought were right; that subsequently, on the same day, she made a definite

proposition for the exchange of her property for that of Hopkins', and that he reported this offer to Hopkins, who said that he didn't think offhand that a deal could be made, but that he didn't care to turn it down at that time; that Hopkins said he had a partner, the defendant Hollingsworth, who had an interest in the premises and that he would report the matter to him; that one or two days thereafter the witness again interviewed Hopkins, who submitted a counter proposition for the exchange of the properties; that he reported this proposition to Mrs. Antler, who refused to accept it; that she, however, requested the witness to again endeavor to procure Hopkins to accept her first proposition; that he called on Hopkins the next day and reported to him what Mrs. Antler had said and that Hopkins refused to accept her offer.

Perlman further testified to subsequent conversations with Mrs. Antler in the course of which she informed him that she was dealing with Hopkins for an exchange of the property; that he, the witness, telephoned Hopkins and informed him that he knew of the dealings between Hopkins and Mrs. Antler and that "in case they made an exchange that I was entitled to my brokerage fee;" that Hopkins replied that he did not know that he was going to make an exchange and he inquired as to the brokerage fee of plaintiff in the event that a deal should be consummated; that he, plaintiff, said his brokerage fee would be $1,000, 2½ per cent of $40,000, the value of the property which Hopkins proposed to exchange; that he, the witness, was willing to make concessions to Hopkins, but that the least possible amount that he could accept for his services was $500; that Hopkins replied thereto that he "couldn't see his way

proposition for the exchange of her property for that of Hopkins', and that he reported this offer to Hopkins, who said that he didn't think offhand that a deal could be made, but that he didn't care to turn it down at that time; that Hopkins said he had a partner, the defendant Hollingsworth, who had an interest in the premises and that he would report the matter to him; that one or two days thereafter the witness again interviewed Hopkins, who submitted a counter proposition for the exchange of the properties; that he reported this proposition to Mrs. Antler, who refused to accept it; that she, however, requested the witness to again endeavor to procure Hopkins to accept her first proposition; that he called on Hopkins the next day and reported to him what Mrs. Antler had said and that Hopkins refused to accept her offer.

Perlman further testified to subsequent conversations with Mrs. Antler in the course of which she informed him that she was dealing with Hopkins for an exchange of the property; that he, the witness, telephoned Hopkins and informed him that he knew of the dealings between Hopkins and Mrs. Antler and that "in case they made an exchange that I was entitled to my brokerage fee;" that Hopkins replied that he did not know that he was going to make an exchange and he inquired as to the brokerage fee of plaintiff in the event that a deal should be consummated; that Mr. plaintiff, said his brokerage fee would be . . . per cent of $40,000, the value of the property which Hopkins proposed to exchange; that he, the witness, was willing to make concessions to Hopkins, but that the least possible amount that he could accept for his services was $300;

that Hopkins replied thereto that he "couldn't see his way

clear to make the deal in accordance with our proposition." No further dealings or conversations were had between the parties. The evidence discloses that subsequently Mrs. Antler, Hopkins and Hollingsworth exchanged their respective properties.

The defendant Hopkins contradicts in material respects the testimony of Perlman and Hurlburt. We think, however, there was evidence in the record which supports the verdict of the jury. While this evidence in material respects is positively contradicted by testimony offered by the defendants, the jury were in a better position to determine this question of fact than are we.

It is also insisted that Perlman, in the transactions referred to, was acting for himself and that he was not the employee of the plaintiff. This is also a disputed question of fact and there is substantial evidence in the record in support of the position of plaintiffs that Perlman was acting for them as their agent. On this point Perlman testified, "All of the commissions went to the firm of H. L. Hurlburt & Co., and they paid me a share of the proceeds; my share was 50%."

Hopkins testified as follows: "$40,000 might have been mentioned by me; that was the value I held it at, on the exchange basis." While it is evident, if Perlman's testimony be true, that the defendant by agreement could have been released from plaintiffs' claim by the payment of $500, they refused to accept this offer, and the jury under the circumstances were permitted to award plaintiffs the sum of $1,000, being 2½ per cent of the exchange value of the property. Law v. Ware, 238 Ill. 360.

No reversible error was committed by the trial court in the matter of refusing to give instructions to the jury. AFFIRMED.

clear to make the jury in accordance with our precedents."

No further inquiry or conversations were had between the parties. The evidence disclosed that subsequently the Miller, Hopkins and Hollingsworth executed their respective projectiles.

The defendant raises contradicts in material respects the testimony of Jackson and Hopkins. The claims, however, there are evidence in the record which supports the verdict of the jury. While this evidence in material respects is positively contradicted by testimony offered by the defendants, the jury were in a better position to determine this question of fact than are we.

It is also insisted that, in the transactions referred to, was acting for himself and that he was not the employee of the plaintiff. This is also a disputed question of fact and there is material evidence in the record in support of the position of plaintiffs that Jackson was acting for them as their agent. [illegible] testified, "All of the commissions were to the firm of [illegible] Murphy & Co., and they paid me a share of the profits; my share was 50%."

Nothing [illegible] "[illegible]" [illegible] have been mentioned [illegible] on the exchange [illegible] testimony to [illegible] been released from [illegible] they relied on [illegible] circumstances were [illegible] $1,000, being [illegible] property. Jay v. [illegible], 58 [illegible].

No reversible error was committed by the trial court in the matter of refusing to give instructions to the jury.

AFFIRMED.

179 - 24100

212 I.A. 647

KOEHRING MACHINE COMPANY,
a corporation,
Appellant,

vs.

AETNA ACCIDENT & LIABILITY CO.,
a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court of Chicago in favor of the defendant.

On April 18, 1916, Hannan-McDonald Company, a copartnership, entered into a written contract with the State Highway Commission of Illinois to construct a state aid road in Cook County, and on May 12, 1916, the defendant, as surety, executed a bond conditioned upon a proper performance of the contract and the payment by Hannan-McDonald Company of any moneys due for machinery, etc., furnished them to be used in the construction work required by the contract.

The Chicago office of plaintiff, Koehring Machine Company, a Wisconsin corporation, during the year 1916 was under the control and management of its District Manager, one George E. Hillsman, who, in writing, had agreed to devote his whole time to the service of plaintiff, for which he was to receive a salary and commissions. On August 18, 1916, Hillsman, acting for plaintiff, sold a concrete mixer to Hannan-McDonald Company, which was used by them in the work required of them under the contract with the Highway Commission. Under the written contract for the sale of the concrete mixer the purchasers agreed to pay therefor a total sum of $2,375; $575 of this sum was paid in cash and the balance by the execution and deliv-

179 - 2A100

KOEHLING MACHINE COMPANY,
a corporation,
Appellant,

vs.

AETNA ACCIDENT & LIABILITY CO.,
a corporation,
Appellee.

APPEAL FROM APPELLATE
COURT OF CHICAGO.

SISTER, J.

MR. PRESIDING JUSTICE DUNN
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court of Chicago in favor of the defendant.

On April 18, 1916, Hannan-Donnell Company, a copartnership, entered into a written contract with the State Highway Commission of Illinois to construct a state aid road in Cook County, and on May 16, 1916, the defendant, as surety, executed a bond conditioned upon a proper performance of the contract and the payment by Hannan-Donnell Company of any moneys due for machinery, etc., furnished them to be used in the construction work required by the contract.

The Chicago office of plaintiff, Koehling Machine Company, a Wisconsin corporation, during the year 1916 was under the control and management of its District Manager, one George E. Hillman, who, in writing, had agreed to devote his whole time to the service of plaintiff, for which he was to receive a salary and commissions. On August 18, 1916, Hillman, acting for plaintiff, sold a concrete mixer to Hannan-Donnell Company, which was used by them in the work required of them under the contract with the Highway Commission. Under the written contract for the sale of the concrete mixer the purchasers agreed to pay therefor a total sum of $2,875; $625 of this sum was paid in cash and the balance by the execution and deliv-

ery of three promissory notes for $600 each due 60, 120 and 180 days from date of bill of lading. The notes were all dated September 19, 1916. Under the terms of the contract plaintiff retained title to the machine until all the payments referred to were made and it reserved to itself therein the right to take possession of the property at any time, with or without legal proceedings, if the purchasers failed to comply with their agreement. The machine was delivered to Hannan-McDonald Company and was used by them in the construction work for the Highway Commission. The sum of $575, due under the contract, was paid by them, but they defaulted in the payment of the three promissory notes for the total sum of $1,800, and the plaintiff seeks in this action to recover the amount due it by bringing suit on the bond executed by the defendant.

The evidence tends to prove that as early as September, 1916, the plaintiff knew of the financial irresponsibility of Hannan-McDonald Company. No effort was made by it to get possession of the machine, which it clearly had the right to do under the contract. In the spring of 1917 a receiver was appointed and took possession of all the property and assets of Hannan-McDonald Company, among which assets was the concrete mixer in question. On June 29, 1917, the receiver sold the concrete mixer to S. R. Adams & Company. This sale was negotiated by Hillsman, the District Manager for plaintiff, who received a commission of $577.50 on the sale. The trial Judge found as a fact that defendant had no knowledge of the existence of plaintiff's rights under the conditional sales contract until June 24, 1917, after the machine had been sold to S. R. Adams & Company. While there is some dispute in the evidence as to this fact, we think on the whole record the evidence preponderates in favor of the

ery of three promissory notes for $500 each due 60, 120 and 180 days from date of bill of lading. The notes were all dated September 19, 1916. Under the terms of the contract plaintiff retained title to the machine until all the payments referred to were made and it reserved to itself thereon the right to take possession of the property at any time, with or without legal proceedings, if the purchasers failed to comply with their agreement. The machine was delivered to Hannan-McDonald Company and was used by them in the construction work for the Highway Commission. The sum of $675, due under the contract, was paid by them, but they defaulted in the payment of the three promissory notes for the total sum of $1,800, and the plaintiff seeks in this action to recover the amount due it by bringing suit on the bond executed by the defendant.

The evidence tends to prove that as early as September, 1916, the plaintiff knew of the financial irresponsibility of Hannan-McDonald Company. No effort was made by it to get possession of the machine, which it clearly had the right to do under the contract. In the spring of 1917 a receiver was appointed and took possession of all the property and assets of Hannan-McDonald Company, among which assets was the concrete mixer in question. On June 29, 1917, the receiver sold the concrete mixer to S. V. Adams & Company. This sale was negotiated by Williamson, the District Manager for plaintiff, who received a commission of $275.00 on the sale. The trial judge found as a fact that defendant had no knowledge of the existence of plaintiff's rights under the conditional sales contract until June 24, 1917, after the machine had been sold to S. V. Adams & Company. While there is some dispute in the evidence as to this fact, we think on the whole record the evidence preponderates in favor of the

correctness of the conclusion of the trial court. It is conceded in the record that the machine at the time it was sold to S. R. Adams & Company was equal in value to the amount of plaintiff's claim. The evidence further tends to show that on May 25, 1917, several months after the plaintiff became aware of the inability of Hannan-McDonald & Company to meet their obligations, and about a month before the sale of the concrete mixer to S. R. Adams & Company, the plaintiff made a demand in writing upon the defendant to pay the amount due on the three notes. The plaintiff did not have the actual possession of the concrete mixer at any time from the date of its delivery to Hannan-McDonald Company until its sale by the receiver to S. R. Adams & Company, nor does the evidence disclose that the plaintiff made any effort whatsoever at any time to gain possession of the property which it had a clear legal right to take, and which if taken by it would have enabled it to extinguish the indebtedness which the defendant in this action is called upon to pay.

It is insisted that plaintiff was not required to re-possess itself of the concrete mixer in order to protect defendant; it is conceded that the law imposes upon a creditor the duty of exercising ordinary diligence in preserving securities in his hands which are applicable to a debt for which another is surety, but it is contended that such creditor is not required to exercise active vigilance with respect to securities which are not in his hands, and it is said that the trial court failed to recognize the all-important distinction between collateral security "not in a creditor's hands, or in his possession" and those which are in his hands.

correctness of the conclusion of the trial court. It is conceded in the record that the machine at the time it was sold to S. R. Adams & Company was equal in value to the amount of plaintiff's claim. The evidence further tends to show that on May 23, 1917, several months after the plaintiff became aware of the inability of Hannan-McDonald & Company to meet their obligations, and about a month before the sale of the concrete mixer to S. R. Adams & Company, the plaintiff made a demand in writing upon the defendant to pay the amount due on the three notes. The plaintiff did not have the actual possession of the concrete mixer at any time from the date of its delivery to Hannan-McDonald Company until its sale by the receiver to S. R. Adams & Company, nor does the evidence disclose that the plaintiff made any effort whatsoever at any time to gain possession of the property which it had a clear legal right to take, and which if taken by it would have enabled it to extinguish the indebtedness which the defendant in this action is called upon to pay.

It is insisted that plaintiff was not required to re-possess itself of the concrete mixer in order to protect defendant; it is conceded that the law imposes upon a creditor the duty of exercising ordinary diligence in preserving securities in his hands which are applicable to a debt for which another is surety, but it is contended that such creditor is not required to exercise active vigilance with respect to securities which are not in his hands, and it is said that the trial court failed to recognize the important distinction between collateral security "not in a creditor's hands, or in his possession" and those which are in his hands.

Many cases are cited and elaborate quotations are contained in the briefs of counsel for plaintiff in support of their contention. In the cases of Fuller et al. v. Tomlinson Bros., 58 Ia. 111, and Massey-Harris Co. v. Graham, 12 West. L. Rep. (Canada) 593, the sureties sued were parties by guaranty or endorsement to certain written agreements given to secure payments required under conditional sales contracts. In the Massey-Harris Co. case the court said:

"Looking at the agreements, it appears that the expression used is, 'I promise to pay,' the legal construction of which, though they are not promissory notes (New Hamburg Manufacturing Co. v. Weisbrod, 4 W. L. R. 125) imports a joint and several liability. (Clark v. Blackstock, Holt, 474.) On the face of the instrument Graham was liable severally for all the agreements and conditions to which Giffen was liable. The evidence of the relation of principal and surety makes Graham's liability only secondary to Giffen's. The law imposes no duty on the plaintiffs to sell before having recourse to Giffen. On the other hand, they are entitled to enforce the promise to pay (per Burton, J. A., in Sawyer v. Fringle, 18 A. R., at p. 227.)

"I cannot interpret the condition that they shall retake and resell before having recourse to the surety. This would imply a condition precedent to the liability of the surety not recognized by law or the language of the agreement: DeColyar, p. 213. The liability of the surety is, I hold, to pay immediately on default by Giffen, and the surety's right to have the transfer of any security would be the title and evidence of ownership of the vendors of the chattels.

"I do not think that the provisions of Sec. 6 of C. O., 1898, Ch. 44, prevent an assignment of the right of the vendors of the chattels. It is, I think, the duty of the vendors to protect the security by registration; but I think, also, it is no more his duty to enforce his right of resale than it is the duty of the creditor to sell under the power of sale in a mortgage before recourse to a surety for the mortgage debt. In other words, it is the duty of the creditor to protect the security so that the surety can enforce it. In the present case I find no evidence for the defendant that the plaintiffs have neglected any active duty which by law or the terms of the contract was imposed on them."

In the Fuller case, supra, the court said:

"The plaintiffs are charged simply with negligence, and, in our opinion, the defendants' position is not tenable. * * * * We have a case where the holder of paper who has a lien upon personal property for security, but is charged with no responsibility for its custody or care, fails to enforce his lien, and the security is lost. We have seen no case which goes to the extent of

Many cases are cited and elaborate propositions are contained in the briefs of counsel for the mutual in support of their contention. In the case of Walker et al. v. Tomlinson Bros., 38 Ia. 311, and Massey-Harris Co. v. Graham, 12 West. L. Rep. (Canada) 394, the sureties had been parties by guaranty or endorsement to certain written agreements given to secure payments required under conditions and contracts. In the Massey-Harris Co. case the court said:

"Looking at the agreements, it appears that the expression used is, 'I promise to pay,' the legal construction of which, though they are not promissory notes (New Hampshire Manufacturing Co. v. Warbrod, 4 N. H. 159) imports a joint and several liability. (Clark v. Blackstock, Holt, 474.) On the face of the instrument Graham was liable severally for all the agreements and conditions to which Giffen was liable. The evidence of the relation of principal and surety makes Graham's liability only secondary to Giffen's. The law imposes no duty on the plaintiffs to sell before having recourse to Giffen. On the other hand, they are entitled to enforce the promise to pay (Portsmith, v. A.. in Lawyer .. Principle, 18 A. R., at p. 327.)

"I cannot infer yet the condition that they shall retake and resell before having recourse to the surety. This would imply a condition precedent to the liability of the surety not recognized in law or the language of the agreement: Gooliver, p. 17. The liability of the surety is, I hold, to pay immediately on default by Giffen, and the surety's right to have the transfer of any security would be the title on evidence of ownership of the vendors of the chattels.

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holding that such failure can be set up in defense by a surety or guarantor, nor do we think that such is the law. If the surety or guarantor apprehends that the security will be lost, it is his privilege to pay the debt and enforce the lien himself."

There is much in the language of the cases last quoted ~~from~~ which supports the position of counsel for plaintiff. It should be noted, however, that there is a marked dissimilarity between these cases and the instant case. In the cases relied upon by counsel the sureties were directly parties to the contracts, knowledge of the substance of which must be presumed as against them. In the instant case the suretyship contract is of a special character and was entered into under the authority of written statutes. Under the circumstances of the case, as they appear in evidence and as the trial court found them, defendant had no knowledge until July 24, 1916, of the existence of the conditional sales contract and hence, in the nature of things, it was impossible for it to protect itself in any manner whatsoever. While under the facts of the case, for the purpose of determining the relations and rights of the parties, the bond and the conditional sales contract should be read together, it does not follow that the defendant is legally chargeable with knowledge of all of the terms of the contract. Defendant was not a party to the instrument and there is nothing in its nature, or that is otherwise shown by the evidence, from which it may be presumed that the defendant in fact had knowledge or notice of its contents. Under such facts as are disclosed by this record it would be most inequitable to limit the application of the principle involved to cases where a creditor has the security in his actual possession. The case of Schroeppel v. Shaw, 3 N. Y. 446, is relied upon. In that case it was said:

holding that such failure can be set up in defense by a surety or guarantor, nor is we think that such is the law. If the surety or guarantor apprehends that the security will be lost, it is his privilege to pay the debt and enforce the lien himself."

There is much in the language of the cases last quoted from which supports the position of counsel for plaintiff. It should be noted, however, that there is a marked distinctivity between these cases and the instant case. In the cases relied upon by counsel the sureties were directly parties to the contracts, knowledge of the substance of which must be presumed as against them. In the instant case the suretyship contract is of a special character and was entered into under the authority of written statutes. Under the circumstances of the case, as they appear in evidence and as the trial court found them, defendant had no knowledge until July 24, 1916, of the existence of the conditional sales contract and, as a matter of things, it was impossible for it to protect itself in any manner whatsoever. While under the force of the cases, for the purpose of determining the relations and rights of the parties, the bond and the conditional sales contract should be read together, it does not follow that the defendant is legally chargeable with knowledge of all of the terms of the contract. Defendant was not a party to the instrument and there is nothing in the record, or that is otherwise shown by the evidence, from which it may be presumed that the defendant in fact had knowledge of the contents. Under such facts as are disclosed by this record it would be most inequitable to limit the application of the principle involved to cases where a creditor has the security in his actual possession. The case of Jacobson v. Jones, 3 S. W. 446, is relied upon. In that case it was held:

> "The defendant was under no higher obligation to collect the bond and mortgage than the plaintiff was to pay the note, and take the bond and mortgage himself."

And it was further said in that case:

> "Thus, it will be seen, that in reference to collateral securities the rule is the same as in reference to the collection of the debt of the principal debtor. The creditor is under no obligation of active diligence for the protection of the surety, so long as the surety himself remains inactive."

This case, like others, in at least one essential particular is unlike the case at bar. Had the defendant known in apt time of the existence of the conditional sales contract in question it could have paid the amount due plaintiff and protected itself by exercising its undoubted right of subrogation to the rights of plaintiff under the contract.

In Brandt on Suretyship, 3rd ed., vol. 1, chap. 28, p. 902, the principle is stated as follows:

> "If the creditor has a surety for the debt, and also has a lien on property of the principal for the security of the same debt, and he relinquishes such lien, or by his act such lien is rendered unavailable for the payment of the debt, the surety is, to the extent of the value of the lien thus lost, discharged from liability. This rule does not depend upon contract between the surety and creditor, but results from equitable principles inherent in the relation of principal and surety."

The principle enunciated above is, we think, applicable to cases where the security is not actually "in the hands" of a creditor, and we have no doubt that there can be such omission on the part of such creditor to protect himself as against a dishonest or failing debtor as will pro tanto release a surety.

It is a peculiar circumstance that Hillsman, the District Manager of the defendant, was the active agent in procuring a transfer of the property in question from the receiver to S. R. Adams & Company. The evidence shows that Hillsman had full charge of plaintiff's business in the district of Chicago and his knowledge of the transfer of the ma-

> "The defendant was under no longer obligation to collect the note and mortgage when the plaintiff was to pay the note, and take the note and mortgage himself."

And it was further said in that case:

> "Thus, it will be seen, that, in reference to collateral securities the rule is the same as in reference to the collection of the note of the principal debtor. The creditor is under no obligation of active diligence for the protection of the surety, so long as the surety himself remains inactive."

This case, like others, in at least one essential particular is unlike the case at bar. And the defendant known in spite of the existence of the conditional sales contract in question it could have paid the amount due plaintiff and protected itself by exercising its undoubted right of subrogation to the rights of plaintiff under the contract.

In Brandt on Suretyship, 3rd ed., vol. 1, chap. 28, p. 902, the principle is stated as follows:

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The principle enunciated above is, we think, applicable to cases where the security is not actually "in the hands" of a creditor, and we have no doubt that there can be such omission on the part of such creditor to protect himself as against a dishonest or failing debtor as will pro tanto release a surety.

It is a peculiar circumstance that Hillman, the district manager of the defendant, was the moving agent in procuring a transfer of the property in question from the receiver to S. H. Adams & Company. The evidence shows that Hillman had full charge of plaintiff's interest in the district of Chicago and his knowledge of the transfer of the re-

chine by the receiver, notwithstanding the authorities and argument of counsel, is fairly chargeable under the circumstances of this case to the plaintiff. It is difficult to understand how the plaintiff could be charged with knowledge of any fact, if the knowledge which Hillsman had of the disposition of the machine in question could not be charged against it. The evidence shows that he sold the machine, as agent for plaintiff, to Hannan-McDonald Company; that he had full knowledge of the terms of the contract; that he knew of the failure to pay the three notes, and that he knew that the receiver appointed to take possession of the assets of Hannan-McDonald Company had, among such assets, taken possession of the machine in question. Hillsman made no effort on behalf of plaintiff to obtain possession of the machine. The evidence does disclose that he acquired the sum of $577.50 as commissions for procuring a sale of this same machine from the receiver to S. R. Adams & Company. It may be assumed that Hillsman in this latter transaction was not acting for plaintiff. This fact, however, does not militate against the force of the argument that Hillsman's knowledge of the facts referred to became the knowledge of his principal, the plaintiff, and is properly chargeable to it. Under the facts it appears that plaintiff not only negligently failed to take possession of the property, even after it had passed into the hands of the receiver, which it had a legal right to do, but it further appears that by affirmative conduct Hillsman had placed it beyond the power of his principal to obtain possession of it. Plaintiff's conduct involved more than "mere inaction or passive negligence."

We think the evidence shows that under the conditional sales contract the machine in question, while

chine by the receiver, notwithstanding the authorization and agreement of counsel, is fairly chargeable under the circumstances of this case to the plaintiff. It is difficult to understand how the plaintiff could be charged with knowledge of any fact, if the knowledge which Hillsman had of the disposition of the machine in question could not be charged against it. The evidence shows that he sold the machine, as agent for plaintiff, to Johnson-McDonald Company; that he had full knowledge of the terms of the contract; that he knew of the failure to pay the three notes, and that he knew that the receiver appointed to take possession of the assets of Johnson-McDonald Company had, among such assets, taken possession of the machine in question. Hillsman made no effort on behalf of plaintiff to obtain possession of the machine. The evidence does disclose that he sold of the sum of $377.00 as commissions for procuring a sale of this same machine from the receiver to J. R. Adams Company. It may be assumed that Hillsman in this latter transaction was not acting for plaintiff. This fact, however, does not militate against the force of the argument that Hillsman's knowledge of the facts referred to became the knowledge of his principal, the plaintiff, and is properly chargeable to it. Under the facts it appears that plaintiff not only negligently failed to take possession of the property, even after it had passed into the hands of the receiver, which it had a right to do, but it further appears that by affirmative conduct Hillsman had placed it beyond the power of the plaintiff to obtain possession of it. Plaintiff's conduct involved more than "mere inaction or passive negligence."

No right has arisen under the conditional sales contract the machine in question, while

not actually in the possession of plaintiff, was under its control in such manner as that it could have taken possession of it at any time between November, 1916, and June 29, 1917.

In Brown Carriage Company v. Dowd, 155 N. C. 307, the court said:

> "The creditor, it is true, must have the means of satisfaction in his hands or under his control, either a lien on the property or something equivalent to it and just as effective, conferred by law or by agreement, or a right with respect to the property, which the law requires him to assert and preserve or enforce for the benefit of the endorser."

There is much force in the contention of counsel that the plaintiff should, under the circumstances of the case, be held to be in a sense a trustee for the benefit of the surety, defendant, and that it was the duty of plaintiff, under the circumstances, to have taken possession of the property for the purpose of enforcing its claim against Hannan-McDonald Company, or, failing in that, to have given defendant notice of the existence of the contract and its provisions and the default of Hannan-McDonald Company at such time and under such circumstances as would have enabled the defendant to have protected itself. Kirkpatrick v. Howk, 80 Ill. 122; Hall v. Hoxsey, 84 Ill. 516; Holmes v. Williams, 177 Ill. 386.

In Fegley v. McDonald, 89 Pa. 128, a case not in all respects similar to the instant case, the court said:

> "The rule is well settled that when a creditor has in his hands the means of paying his debt out of the property of his principal debtor, and does not use it, but gives it up, the surety is discharged. It need not be actually in the hands of the creditor; if it be within his control, so that, by the exercise of reasonable diligence he may have realized his pay out of it, yet voluntarily and by supine negligence relinquished it, the surety is discharged."

not actually in the possession of plaintiff, was under its control in such manner as that it could have taken possession of it at any time between November, 1916, and June 29, 1917.

In Brown Carriage Company v. Byad, 158 N. C. 507, the court said:

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There is much force in the contention of counsel that the plaintiff should, under the circumstances of the case, be held to be in a sense a trustee for the benefit of the surety, defendant, and that it was the duty of plaintiff, under the circumstances, to have taken possession of the property for the purpose of enforcing its claim against Hannon-McDonald Company, or, failing in that, to have given defendant notice of the existence of the contract and its provisions and the default of Hannon-McDonald Company at such time and under such circumstances as would have enabled the defendant to have protected itself. Lippincott v. Hope, 80 N.J. 152; Hall v. Hogan, 26 Ill. 304; Chase v. Williams, 177 Ill. 386.

In Bailey v. McDonald, 40 N. H. 128, a case not in all respects similar to the instant case, the court said:

> "The rule is well settled that when a creditor has in his hands the means of paying his debt out of the property of his principal debtor, he is bound to use it, but giving it up, the surety is discharged. It need not be actually in the hands of the creditor; it is be within his control, so that, by the exercise of reasonable diligence he may have realized his pay out of it, yet voluntarily and by unjustifiable neglect he permits it, the surety is discharged."

The above quoted language clearly expresses the true intent of the law when applied to facts such as we have under consideration here.

The judgment of the Municipal court will be affirmed.

AFFIRMED.

The above quoted language clearly expresses the true intent of the law when applied to facts such as we have under consideration here.

The judgment of the municipal court will be affirmed.

AFFIRMED.

261 - 24188

JAMES F. BISHOP, Administrator of the Estate of ANGELO ZORZI, deceased,
Appellant,

vs.

THE PULLMAN COMPANY, a corporation,
Appellee.

212 I.A. 647

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Superior Court of Cook County in favor of the defendant.

The plaintiff as administrator brought suit against the defendant to recover damages for the alleged wrongful death of Angelo Zorzi. On December 15, 1917, the plaintiff filed a praecipe in the Clerk's office of the Superior Court, in which the clerk was directed to issue a summons to the defendant, the Pullman Company, in a plea of trespass on the case. The summons was issued on the same date and the defendant was directed therein to appear before the Superior Court on the first day of the January term 1918, to answer unto the plaintiff in a plea of trespass on the case upon promises, etc. On December 19, 1917, the plaintiff filed his declaration, which consisted of seven counts, in an action of trespass on the case. On January 8, 1918, the defendant filed its plea in abatement which set up that a variance existed between the writ and the declaration. On February 9, 1918, the plaintiff moved the court for leave to amend the summons which had been issued in the cause by striking out the words "upon promises." The motion to amend the summons was denied, the summons was

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JAMES Y. BISHOP, Administrator of the Estate of ANGELO ZORAKI, deceased,

Appellant,

vs.

THE PULLMAN COMPANY, a corporation,

Appellee.

PLEA. 042

TO THE HONORABLE, THE SUPREME COURT OF STATE OF CALIFORNIA:

MR. PRESIDING JUSTICE AND JUSTICES:

DELIVERED THE [illegible] OPINION.

This is an appeal by plaintiff from a judgment of the Superior Court of Yolo County in favor of the defendant.

The plaintiff as administrator [illegible] suit against the defendant to recover damages [illegible] wrongful death of Angelo Zorki. On December 1, 1916, the plaintiff filed a praecipe in the Clerk's office of the Superior Court, in which the clerk was directed to issue a summons to the defendant, the Pullman Company, in a [illegible] of trespass on the case. The summons was issued on the same date and the defendant was directed to plead to [illegible] before the Super[illegible] on the first [illegible] Monday in term 1916, to answer unto the plaintiff in a plea of trespass on the case upon promises, etc. On December 13, 1917, the plaintiff filed his declaration, [illegible] counts of seven counts, in an action of trespass on the case. On January 8, 1918, the defendant filed its plea in abatement which set up that a verdict existed [illegible] and the declaration. On February 9, 1918, the plaintiff moved the court for leave to amend the summons [illegible] been issued in the cause by striking out the words "on trespass." The motion to amend the summons was denied, the summons was

was quashed, and judgment was entered in favor of the defendant on its plea in abatement. We think the motion should have been allowed.

Chapter 110, Section 39 (the Practice Act), Hurd's Illinois Revised Statutes, 1917, page 2239, provides:

> "At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of action, and in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense."

The law as above set forth is substantially the same as that prescribed in Section 1, Chapter 7, Hurd's Revised Statutes, 1917, on page 58, and Section 6 of this chapter likewise provides that no judgment shall be arrested for a variance between the original writ and pleadings subsequently filed.

There can be no doubt that the plea in abatement filed by defendant was a good plea when filed, but we would be loathe to hold, unless compelled by authority to do so, that the trial court had a discretionary power to deny the motion to strike the words "upon promises" from the summons. The variance between the original writ and the declaration is of the most technical character and it is not difficult to believe that the error was caused by inadvertence on the part of the clerk who issued the summons.

While it may be conceded that the defense of the statute of limitations is a meritorious defense, it does not follow from this fact that a meritorious claim should be defeated because of the variance which is shown by the record of this case. Less than two months had elapsed between

was quashed, and judgment was entered, in favor of the defendant on its plea in abatement. [illegible] should have been sustained.

Chapter 33, [illegible] of the Illinois Revised Statutes [illegible] provides:

> "At any time before trial [illegible] in a civil suit, amendments [illegible] as are just and reasonable, [illegible] necessary to be joined as plaintiff or defendant, discontinuing as to any joint [illegible] defendant, changing the form of action, [illegible] or proceeding which may [illegible] the action for the [illegible] brought or the defendant [illegible]."

The law as above [illegible] in substantially the same as that prescribed in [illegible] Chapter 7, Irwin's Revised Statutes, 1917, [illegible] chapter likewise provides [illegible] for a variance between the [illegible] and pleadings [illegible] subsequently filed.

[illegible] motion filed by defendant was a good plea [illegible] we would be loathe to [illegible] no, that the trial court [illegible] the motion to strike [illegible] motions. The variance between [illegible] ration in of the cost [illegible] difficult to believe that [illegible] on the part of the court [illegible].

[illegible] the statute of limitations [illegible] not follow from this fact [illegible] defected because of the variance which is [illegible] and of this case. [illegible] no motion had [illegible]

the filing of the praecipe and the making of the motion to amend the summons, and the written objection to the motion to amend set up that the statute of limitations had run against any new suit for the cause of action set forth in the declaration; in other words, it appears that a disallowance of the motion to amend would put the plaintiff out of court. Defendant contends that by pleading the statute of limitations it has a complete defense to any new suit which might have been brought after the dismissal of the action, as prayed for in its plea in abatement, and it may be assumed that this defense was not available to defendant in the action begun by plaintiff on the 15th day of December, 1917.

We think that in the exercise of a sound judicial discretion the court in this case should have allowed the motion to amend the summons. While the language of the statute above quoted is that "amendments may be allowed", etc., we are inclined to the opinion that this language should be construed to mean that on facts such as are shown by this record, the plaintiff had a clear legal right to the allowance of his motion.

A mere clerical error on the part of the clerk should not be permitted to so prejudice the rights of a party who claims to have substantial right of action against an alleged wrongdoer. The policy of the law may be found in the language of the enactment of the legislature and that policy, as we view it, is that persons having substantial legal claims against others shall not have their rights prejudiced because of technical error in either process or pleadings. The record does not disclose any lack of reasonable diligence on the

the filing of the pracipe and the making of the motion to amend the summons, and the written objection to the motion to amend set up that the statute of limitations had run against any new suit for the cause of action set forth in the declaration; in other words, it appears that a dismissance of the motion to amend would put the plaintiff out of court. Defendant contends that by pleading the statute of limitations it has a complete defense to any new suit which might have been brought after the dismissal of the action, as prayed for in its plea in abatement, and it may be assumed that this defense was not available to defendant in the action begun by plaintiff on the 15th day of December, 1917.

We think that in the exercise of a sound judicial discretion the court in this case should have allowed the motion to amend the summons. While the language of the statute above quoted is that "amendments may be allowed", etc., we are inclined to the opinion that this language should be construed to mean that no more than mistakes shown by this record, the plaintiff had a clear legal right to the allowance of his action.

A mere clerical error on the part of the clerk should not be permitted to so prejudice the rights of a party who claims to have substantial right of action against an alleged wrongdoer. The policy of the law may be found in the language of the amendment of the legislature and that policy, as we view it, is that persons having substantial legal claims against others shall not have their rights prejudiced because of technical error in either process or pleadings. The court has not disclose any lack of reasonable diligence on the

part of the plaintiff and he should be permitted, under the circumstances disclosed here, to have his day in court. It is evident that plaintiff intended to bring an action on the case; this is shown by the praecipe and the declaration, and the summons should be made to conform to this intention. Misch v. McAlpine, 78 Ill. 507.

The judgment of the Superior Court of Cook County will be reversed and the cause remanded to that court with directions to allow plaintiff's motion to amend the summons issued in the cause.

REVERSED AND REMANDED.

part of the plaintiff and he should be permitted, under the circumstances disclosed here, to have his day in court. It is evident that plaintiff intended to bring an action on the case; this is shown by the language and the declaration, and the summons should be made to conform to this intention. Wood v. Mallory, 78 Ill. 547.

The judgment of the Superior Court of Cook County will be reversed and the cause remanded to that court with directions to allow plaintiff's motion to amend the summons issued in the cause.

REVERSED AND REMANDED.

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212 I.A. 647

COLONIAL TRUST & SAVINGS BANK,
Appellant,

vs.

G. H. CONEY doing business as
G. H. CONEY & CO.,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal court in favor of defendant.

The plaintiff, Colonial Trust & Savings Bank, brought suit in the Municipal court of Chicago against the defendant, G. H. Coney, doing business as G. H. Coney & Company, to recover damages for an alleged conversion of certain securities.

On November 25, 1907, the plaintiff sold to defendant a mortgage loan business, conducted by defendant prior to that date, for the sum of $100,000, which sum was under the contract to be paid to plaintiff in eight annual installments. The defendant had paid $75,000 of the purchase price at the time suit was brought. The contract under which the defendant took possession of the business formerly conducted by plaintiff provided for the sale to defendant of the good will of the business and the papers and correspondence thereto belonging; of all credits shown on the books of the mortgage loan department of plaintiff, including moneys on deposit and all balances due plaintiff from mortgagors by reason of certain advancements. The defendant for some years prior to November 25, 1907, had been an employee of plaintiff, which in addition to its mortgage loan business also had conducted a general banking business in Chicago, and the contract provided that plaintiff and de-

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COLONIAL TRUST & SAVINGS BANK,
Appellant.

vs.

G. H. CONNY doing business as
G. H. CONNY & CO.,
Appellee.

MR. PRESIDING JUSTICE DAVIS
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the municipal court in favor of defendant.

The plaintiff, Colonial Trust & Savings Bank, brought suit in the Municipal Court of Chicago against the defendant, G. H. Conny, doing business as G. H. Conny & Company, to recover damages for alleged conversion of certain securities.

On November 21, 1907, the plaintiff sold to defendant a mortgage loan [illegible] by defendant prior to that date, for the sum of $[illegible], which sum was under the contract to be paid to plaintiff in eight monthly installments. The defendant had paid $75,000 of the purchase price at the time suit was brought. The contract under which the defendant took possession of the business formerly conducted by plaintiff provided for the [illegible] to defendant of the good will of the business and [illegible] and correspondence showing ownership of all records shown on the books of the mortgage loan department of plaintiff, including moneys on deposit [illegible] due plaintiff from mortgagors by reason of certain advancements [illegible] defendant for some years prior to November 26, 1907, [illegible] been an employee of plaintiff, which [illegible] in the mortgage loan business also had conducted a general banking business in Chicago, and the contract provided that plaintiff and de-

fendant were to co-operate in the mortgage loan business to be conducted after the execution of the contract by defendant.

Under the contract the plaintiff agreed to purchase first mortgages from defendant from time to time and also to make loans to defendant, not to exceed the sum of $200,000 at any one time, said loans to be secured by first mortgages on real estate in Cook County, Illinois.

Following the execution of the contract the defendant conducted the mortgage loan business formerly owned and operated by plaintiff, and within a short time defendant, being in need of financial assistance, applied to plaintiff's president and vice-president for a loan of $38,000. Defendant testified that these officers stated to him that in that defendant was a director of plaintiff they could not accept his note, but that he could obtain the loan by withdrawing mortgages then in possession of plaintiff and leaving trust receipts therefor. The only question which we are called upon to determine is whether the trust receipts transactions, which were continued after the delivery of the first receipts to plaintiff, are to be regarded as loans by which the relationship of debtor and creditor was established between plaintiff and defendant.

In testifying the defendant, referring to the practice of the parties under the contract, said:

> "I told them both that I had paid out all the cash they had credited to me, and that I could not collect their liabilities, and that I needed more cash or I could not liquidate the balance of their liabilities. I was asked how much I wanted. I said enough to pay liabilities as they are presented. I was then told that being a director of the bank they did not want my note in the bank, and instead of that I could withdraw these mortgages on trust receipts and when I made a new mortgage I could substitute the mortgage and take up the other receipt. The next time one of those liabilities was presented for payment, if I didn't have enough

fendant were to co-operate in the mortgage loan business to be conducted after the execution of the contract by defendant.

Under the contract the plaintiff agreed to purchase first mortgages from defendant from time to time and also to make loans to defendant, not to exceed the sum of $200,000 at any one time, said loans to be secured by first mortgages on real estate in Cook County, Illinois.

Following the execution of the contract the defendant conducted the mortgage loan business formerly owned and operated by plaintiff, and within a short time defendant, being in need of financial assistance, applied to plaintiff's president and vice-president for a loan of $58,000. Defendant testified that these officers stated to him that in that defendant was a director of plaintiff they could not accept his note, but that he could obtain the loan by withdrawing mortgages then in possession of plaintiff and leaving trust receipts therefor. The only question which we are called upon to determine is whether the trust receipts transactions, which were consummated after the delivery of the first receipts to plaintiff, are to be regarded as loans by which the relationship of debtor and creditor was established between plaintiff and defendant.

In testifying the defendant, referring to the practice of the parties under the contract, said:

"I told them both that I had paid out all the cash they had credited to me, and that I could not collect their liabilities, and that I needed more cash or I could not liquidate the balance of trust receipts. I was asked how much I wanted. I said enough to pay liabilities as they are presented. I was told that being a director of the bank they did not want my note in the bank, and instead of that I could withdraw these mortgages on trust receipts and when I made a new mortgage I could substitute the mortgage and take up the other receipt. The next time one of those liabilities was presented for payment, I didn't have enough

money in the bank I went over and took one of their mortgages on a receipt and sold it and they held my receipt until I had made a new mortgage. Then I would go over and take up the old receipt."

The evidence shows that at the time mortgages were delivered to defendant under the contract and for which trust receipts were given, plaintiff required of defendant financial statements showing his financial condition at the time of the various transactions, and plaintiff's note teller testified in substance that defendant or his agents when taking up the trust receipts would deliver a check to plaintiff and "would not state where he had obtained the proceeds with which he was taking up the securities nor what disposition he had made of the securities he had taken out."

The trust receipts which were delivered to plaintiff by defendant were in the following form:

"Colonial Trust and Savings Bank.

Please deliver to the bearer the undermentioned property, which we hereby agree to hold in trust for you (we being your agent in handling said property) until we account to you by returning same or its proceeds this day to your satisfaction, or an equivalent satisfactory to you to be rendered in its place."

From the whole evidence introduced upon the trial we are not convinced that the verdict of the jury in favor of the defendant was wrong. The transactions under consideration were in pursuance of the contract under which the plaintiff agreed to make loans to the defendant. When it became necessary, following his purchase of the business, for defendant to borrow money, he applied to plaintiff, which adopted the form of contract which the defendant insists became thereafter the constant practice of the parties. The two trust receipts involved in the present litigation were delivered by plaintiff for bonds and mortgages of the face value of $10,000; these bonds and mortgages were delivered to plaintiff in June, 1914, and before June 27, 1914. The plaintiff ceased to operate as a bank on the latter date.

money in the bank I went [illegible] took one of their pri-
vates on a receipt and said it and they held my receipt
until I had made a new mortgage. "Then I went to over
and take up the old receipt."

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delivered to defendant under the contract and for which trust
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property, which we hereby agree to hold in trust for you
(we being your agent in handling such property) until we
account to you by returning same to proceeds thereof
to your satisfaction, or as [illegible] satisfactory to
you to be rendered in its [illegible]

From the [illegible] and also the
trial we are not convinced that [illegible] in
favor of the defendant are wrong. [illegible] under
consideration here in [illegible] the trial court [illegible]
the plaintiff proved [illegible]
it became necessary, [illegible]
for defendant to borrow money, [illegible]
adopted the form of [illegible]
came thereafter the [illegible]
two trust receipts [illegible]
delivered by plaintiff [illegible]
value of $[illegible]; these [illegible] were delivered to
plaintiff in June, 1914, and before [illegible], 1914. The
plaintiff ceased to operate in [illegible] on the [illegible]

After the suspension of its banking business the plaintiff refused to make further loans to or to purchase mortgages from defendant.

It is insisted by counsel for plaintiff that the appropriation by defendant of the bonds and mortgages in question to his own use was a conversion of the property of plaintiff. It will be noted that the trust receipts given for the securities in question are somewhat ambiguous in their terms. It is provided therein that the defendant is to hold securities delivered to him in trust for plaintiff, but this trust relationship is limited in the receipts until such time as the defendant might return the securities or their proceeds, or an equivalent therefor satisfactory to plaintiff.

We do not think the court erred in admitting oral evidence of the practice of the parties in pursuance of the written contract entered into by them, nor that the trust receipts are to be regarded as final in determining the actual relationship which existed between the parties.

There is some contradiction in the evidence, but the jury were authorized under the evidence to accept the testimony of defendant that the form which the parties used in the transactions in question was adopted solely because of the defendant's relation to the bank, he being a director thereof at the time the transactions were entered into. There could be no conversion of the securities in question if, as a matter of fact, the parties intended upon their delivery to defendant that he might dispose of them as he saw fit. While the trust receipts on their face require his return of the securities given to him, their proceeds, or their equivalent in value, on the day of their delivery to defendant, the evidence shows that in practice no such delivery was required.

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We do not think the court erred in admitting oral evidence of the practice of the parties in surrender of the written contract entered into by them, nor that the trust receipts are to be regarded as final in determining the actual relationship which existed between the parties.

There is some contradiction in the evidence, but the jury were authorized under the evidence to accept the testimony of defendant that the form and the practice used in the transactions in question was adopted solely because of the defendant's relation to the bank, he being a director thereof at the time the transactions were started.

There could be no conversion of the securities in question if, as a matter of fact, the parties intended upon their delivery to defendant that he might dispose of them as he saw fit. While the trust receipts on their face require the return of the securities given to him, their proceeds, or their equivalent in value, on the day of their delivery to defendant, the evidence shows that in practice no such delivery was required.

We think there is evidence in the record which warrants the conclusion that the plaintiff parted with its property right in the securities in question and that it was understood by the parties that the title thereto was to pass by the transaction to the defendant, or, at least, that defendant had the right to convert the securities to his own use.

In Mills v. Snell, 104 Mass. 173, the court said:

> "The unauthorized appropriation of personal chattels will generally be sufficient of itself to enable the true owner to maintain an action for their conversion. * * * * But this severe rule of law will not be applied when the act of appropriation can be justified as having been authorized in any manner by the owner of the property."

It does not seem possible to escape the conclusion that defendant had the right to sell the securities, and that being so, it is difficult to understand how he could by selling them have converted them to his own use. The jury and the trial court were called upon to determine whether there had been a conversion of plaintiff's property, and the evidence in the record is of such character that we are unable to say that the jury erred in finding a verdict in favor of the defendant. Stock Yards Co. v. Mallory. 157 Ill. 544, 563; Shafton Co. v. St. L. I. M. & S. Ry. Co., 174 Ill. App. 121, 123.

Plaintiff cannot recover in an action of trover for the mere breach of defendant's promise to return the securities, or their equivalent, either in money or in other securities. Under the contract, as interpreted by the acts of the parties themselves, the defendant was not required to return the particular thing received by him and he did have the right to return therefor other securities, or the equivalent in value of those received by him. The transactions were not bailments. Lonergan v. Stewart, 55 Ill. 44, 49.

We think there is evidence in the record which warrants the conclusion that the plaintiff parted with the property right in the securities in question and that it was understood by the parties that the title thereto was to pass by the transaction to the defendant, or, at least, that defendant had the right to convert the securities to his own use.

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Plaintiff cannot recover in an action of trover for the mere breach of defendant's promise to return the securities, or their equivalent, either in money or in other securities. Under the contract, as interpreted by the acts of the parties themselves, the defendant was not required to return the particular thing received by him and he did have the right to return therefor other securities, or the equivalent in value of those received by him. The transactions were not bailments. Jackson v. Stewart, 55 Ill. 44, 49.

If it be conceded, as urged by counsel for plaintiff, that the officers of plaintiff were not authorized under the law to enter into the transactions in question, we are unable to understand how this fact may change the essential nature of the relationship established thereby. If the conclusion of the jury is right as to the facts of the case and the real nature of these transactions, then it is difficult to see how we are authorized to change the nature of these transactions merely because the officers who acted for plaintiff exceeded their authority. If the dealings between the parties established the relationship of debtor and creditor, an application of the doctrine of estoppel could not change this relationship to that of agent and principal.

The court did not err in its rulings upon the admission of evidence. When defendant acquired ownership of plaintiff's mortgage loan business he assumed liabilities to meet which plaintiff agreed to make the loans referred to in the contract, and while there is some dispute in the evidence we think it fairly appears that the transactions in question were entered into in compliance with the terms of the contract; hence the contract was admissible in evidence as well as the trust receipts and it was proper by parol evidence to show the interpretation which the parties themselves placed upon these instruments.

The judgment of the Municipal court wibl be affirmed.

AFFIRMED.

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The judgment of the municipal court will be affirmed.

AFFIRMED.

326 - 24253

MILDRED BROWN, a minor, by GEORGE BROWN, her next friend, Appellee,

vs.

CITY OF CHICAGO, Appellant.

212 I.A. 647

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior court in favor of plaintiff and against defendant for the sum of $4,000.

The plaintiff, a child of ten years of age, sustained injuries while using a public sidewalk at 400 W. 61st street in the city of Chicago. There is no dispute between the parties to the action as to the circumstances attending the accident which caused the injuries which plaintiff received. Counsel for defendant asserts that the only error which the defendant complains of in the conduct of the trial is the giving and refusing to give certain instructions. At the request of the plaintiff the court gave the jury the following instruction:

> "If from the preponderance of the evidence and under the instructions of the court the jury find the defendant guilty, then, in assessing plaintiff's damages, if any, the jury should take into consideration the extent and nature of the injury, if any, shown by the evidence, offered by her as a direct and natural result of the accident in question; the pain and suffering, if any, which the jury may believe from the evidence the plaintiff has sustained as a direct and natural result of such injury, if any, have been alleged in the declaration and shown by a preponderance of the evidence; and thereby the jury will determine from the evidence what sum will be a fair and just compensation for such injury, if they find a verdict for the plaintiff."

The court refused to give to the jury the following instruction tendered by the defendant:

326 - 24232

MILDRED BROWN, a minor, by
GEORGE BROWN, her next friend,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

MR. JUSTICE [illegible]

delivered the opinion of the court.

This is an appeal from a judgment [illegible] entered in favor of plaintiff and against defendant for the sum of $4,000.00.

The plaintiff, a child [illegible] years, sustained injuries while [illegible] a wooden bridge [illegible] flat street in the city of [illegible]. [illegible] between the parties as to the action of [illegible] concerning the accident which caused the injuries [illegible] tiff received. Counsel for defendant [illegible] error which the defendant contends [illegible] trial is the giving and refusing [illegible] instructions. At the request of the plaintiff the [illegible] the following instructions:

"If from the preponderance [illegible] under the instructions of [illegible] defendant guilty, [illegible] damages, if any, the jury [illegible] tent and malice [illegible] dence, offered [illegible] the accident [illegible] which the jury [illegible] tiff has [illegible] such injury, if any, [illegible] tion and crossing [illegible] thereby the jury [illegible] may will be a just [illegible] jury. [illegible]

[illegible]

lowing instructions [illegible]:

"The court instructs the jury that if you believe the defendant guilty, even then the plaintiff can not recover in this suit either for medical service or for diminution of earning power during minority, and in this case you are to disregard all evidence tending to prove either the value of medical service or the diminution of earning power during minority."

On behalf of the defendant is is insisted that it was error to give the instruction read to the jury unless qualified by an instruction substantially similar to that tendered by defendant. Counsel for defendant rely upon the case of Richardson v. Nelson, 221 Ill. 254, in support of their argument that the instruction given for plaintiff would permit the jury to assess damages for loss of earning power during minority and for medical expenses. The defendant urges that the wages and earnings of a minor during minority are the property of its parents and that in a case where a minor is injured through the negligence of another, the parent alone has the right to recover of the party at fault for the loss of earning power during minority and for the necessary medical expenses incurred. The instruction complained of in the Richardson case, supra, informed the jury that the jury had a right to and should take into consideration such loss and inability to work in the future as the evidence showed would result from the injuries which plaintiff in that case complained of. We find no such language in the instruction given for plaintiff in the instant case. This instruction informs the jury in general terms that the plaintiff could recover for "the pain and suffering, if any, which the jury may believe from the evidence that plaintiff had sustained as a direct and natural result of such injury," and that the jury "should take into consideration the extent and nature of the injuries, if any, shown by the evidence offered by her as a direct and natural result of the accident in question." The instruction com-

"The court instructs the jury that if you believe the defendant guilty, even then the plaintiff can not recover in this suit either for medical services or for diminution of earning power during minority, and in this case you are to disregard all evidence bearing to prove either the value of medical services or the diminution of earning power during minority."

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plained of here is not at all similar to the one discussed in the Richardson case, supra. In the instruction under consideration the jury is informed that the plaintiff might recover for such injuries as the jury believe from the evidence were the direct and natural result of the accident in question. It is not contended by defendant that any attempt was made upon the trial to prove either a loss of earning power during minority or that plaintiff or her next friend had incurred any expenses for medical service.

No claim being made by plaintiff that plaintiff had sustained damages by loss of earning power, or because of medical expenses incurred, we are unable to see why the instruction asked for by the defendant should be given. While the general language of the given instruction might be regarded as misleading, we do not think that the jury under the circumstances of the instant case could have been misled to the extent of awarding the plaintiff damages which she was not entitled to in law.

There is also much force in the contention that where the father of a minor plaintiff brings suit, as next friend, and in such suit claims damages which could be recovered by the father in a separate suit in his own name, a judgment in favor of the plaintiff including such damages is not erroneous. Scott v. White, 71 Ill. 287.

In Chicago Screw Co. v. Weiss, 203 Ill. 536, the Supreme court said:

> "The parent may relinquish his right to the earnings of his child. * * * * The prosecution of a suit in the name of the child by the father, as next friend, for the recovery of the earnings of the minor, would be equivalent to a relinquishment on the part of the father of the authority to claim such earnings in his own right."

The judgment of the Superior court is affirmed.

AFFIRMED.

plained of here is not at all similar to the one discussed in the Richardson case, supra. In the instruction under consideration the jury is informed that the plaintiff might recover for such injuries as the jury believe from the evidence were the direct and natural result of the accident in question. It is not contended by defendant that any error was made upon the trial to prove either a loss of earning power during minority or that plaintiff or her parents incurred any expenses for medical service.

No claim being made by plaintiff that plaintiff had sustained damages by loss of earning power, or for payment of medical expenses incurred, we are unable to see how the instruction asked for by the defendant should be given. While the general language of the given instruction might be regarded as misleading, we do not think that under the circumstances of the instant case it could have been misleading to the extent of awarding the plaintiff damages to which she was not entitled to in law.

There is also much force in the contention that where the father of a minor plaintiff engages just, as next friend, and in such suit claims damages which could be recovered by the father in a separate suit in his own name, a judgment in favor of the plaintiff [illegible] damages is not erroneous. Scott v. [illegible], [illegible].

In Gilmore Server [illegible], [illegible], the Supreme court said:

> "The parents by reproduction [illegible] of his suit. [illegible] name of the child by the [illegible] recovery or the earning [illegible] lost to a relinquishment [illegible] the authority to claim such earnings [illegible]."

The judgment of the [illegible] court is affirmed.

AFFIRMED.

363 - 24290

212 I.A. 648

GEORGE HEMSTEAD,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Circuit Court to recover damages for alleged injuries received by him on the 20th day of February, 1915.

The declaration filed in the cause consists of three counts; the first alleges that while plaintiff with due care was attempting to board a street car controlled and operated by defendants, and before he had sufficient time to get thereon, and while he was in the act of so doing, defendants negligently and unskillfully caused the car to move forward suddenly and violently causing the plaintiff to fall to the ground, thereby injuring him. The second count alleges that the defendants negligently overloaded and crowded the car with passengers so that the plaintiff was obliged to stand on the step of the platform of the car; that while he was so riding upon the car the defendants negligently and unskillfully caused the car to give violent jerks and lurches, thereby throwing plaintiff to the ground. The third count is in substance the same as the second, except that it charges that by reason of the overcrowding the plaintiff was pushed off the car and onto the pavement of the street.

The jury that tried the cause brought in a verdict in favor of the plaintiff for the sum of $3,500. Judgment was entered upon this verdict and the defendants by

565 - 24290

GUNDER HERSTRAD,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY
et al.,
Appellants.

212 I.A. 648

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DUNNE
DELIVERED THE OPINION OF THE COURT:

Plaintiff brought suit in the circuit court to recover damages for alleged injuries received on the 20th day of November, 1912.

The declaration filed in the cause consists of three counts; the first alleges that while plaintiff in the exercise of due care was alighting from one of defendants' cars, which was being operated by defendants, and was in the act of so doing, defendants negligently and unlawfully caused the car to move forward suddenly and violently, causing the plaintiff to fall to the ground, thereby injuring him. The second count alleges that the defendants negligently overloaded and crowded the car with passengers so that the plaintiff was obliged to stand on the step of the platform of the car; that while he was so standing upon the car the defendants negligently and unlawfully caused the car to give violent jerks and turns, thereby throwing the plaintiff to the ground. The third count is an [illegible] the second, except that it charges that by reason of the overcrowding the plaintiff was pushed off the car and onto the pavement of the street.

The jury, who tried the cause without in a verdict in favor of the plaintiff for the sum of $[illegible]. Judgment was entered upon this verdict and the defendants

this appeal seek to reverse this judgment. It is insisted on behalf of the defendants that the verdict of the jury was against the manifest weight of the evidence admitted on the trial.

The plaintiff testified in substance that he got upon the car in question at the southeast corner of Madison and Clark streets in Chicago, the usual stopping place for street cars north bound on Clark street; that he was the last one of several persons to get upon the car at that place; that he had placed one foot on the step of the car and was about to step upon the platform thereof, but was prevented from so doing by the presence of persons in front of him who were moving into the car on the rear platform and who were paying their fares to the conductor; that while he was so standing on the step of the car he had hold with his right hand of the middle rod which extended from the roof of the car to the platform; that while in that position the conductor rang the bell and the motorman started the car with a jerk; that when the car jerked he lost his hold on the rod and fell from the car "just after crossing Madison street;" that he fell from the car a few feet north of Madison street; that he became unconscious and was taken to the Emergency Hospital and the same day was removed therefrom to his home by his wife; that after he reached home he was feeling very weak and was attended by a doctor; that he sustained as a result of his fall from the car a cut on the back part of his head; that as a result of his injuries he was confined to his home for a period of over six weeks; that thereafter he gradually became stronger and in about six months after the accident went to work. Plaintiff also testified that prior to the injuries he was healthy and that about six weeks after the accident he had what he describes as convulsions; that he had six or seven

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of these attacks following the accident, the last of which occurred about a year and a half before the date of the trial.

Plaintiff's testimony relating to the circumstances attending the accident is corroborated in the main by a witness named Serviss, who testified that at the time of the accident he was seated on a box on the rear platform of the car; that he saw plaintiff attempt to get on the car "when the conductor pulled up;" that the plaintiff at the time had hold of the handle when the car gave a "sudden jerk after it passed over the car rail, that is the other track, the Madison street track, and it throwed him."

For the defendant a police officer testified that he saw the plaintiff attempt to get upon the car in question north of Madison street; that the plaintiff attempted to get upon the car while it was in motion; that plaintiff got hold of the rail, but lost his footing on the car and was swung back onto the street so that he struck his head on the rail. This witness said that the plaintiff had "just got on the car when I happened to glance that way and see him. Whether he ran there or not I don't know. * * * * I didn't see anybody standing on the step as it passed me."

A police officer named Hellberg, witness for defendants, testified that he took plaintiff in a patrol wagon to the hospital; that while plaintiff was in the wagon he asked him how the accident happened and plaintiff stated that he ran for the car and missed his hold and fell to the pavement.

Another police officer testified that the

of these attacks following the accident, [illegible] occurred about a year and a half before the date of the trial.

Plaintiff's testimony relative [illegible] attendance attending the accident [illegible] by a witness named Jarvis, [illegible] of the accident he was seated on a [illegible] platform of the car; that he saw plaintiff [illegible] when the conductor pulled up; that [illegible] time had hold of the handle [illegible] jerk after it passed over the [illegible] track, the Madison street track, [illegible]

For the defendant [illegible] that he saw the plaintiff attempt [illegible] in question north of Madison street [illegible] tempted to get upon the car [illegible] plaintiff got hold of the rail, [illegible] the car and was hung back on [illegible] struck his head on the rail. [illegible] plaintiff had "just got on the car [illegible] that was and he was [illegible] know. [illegible] I didn't see [illegible] it passed me."

A police [illegible] defendants, testifying that [illegible] wagon to the hospital; [illegible] he asked him how the accident happened, [illegible] that he ran for the car [illegible] his feet on the pavement.

Another police officer [illegible]

plaintiff told him at the hospital that he, plaintiff, was injured while getting on a moving car.

A police officer named Ronan testified that he was riding upon the rear end of the car in question at the time the accident occurred; that when the car got to the north crosswalk of Madison street and Clark street he saw a man, who was standing at the northeast corner of the intersection, attempt to board the car as it proceeded north on Clark street; that "he got a hold of both bars, one in the center of the platform and one in the back, and his feet were on the step, then he fell off." On rebuttal the plaintiff denied the conversations testified to by the police officers.

The conductor of the street car in question testified that he was busy collecting fares before he started up across Madison street; that he heard a patter of feet running and as he was collecting the fares he looked up and saw a man running. "He was just about a step or two from the car when I saw him. He got hold of the car and tried to get on, and he either missed his footing -- I couldn't see just exactly how he done it, but he fell." This witness testified that plaintiff attempted to board the car about 50 or 75 feet north of the north crosswalk of Madison street.

A witness named Knudson testifying for defendant said that he was standing on Madison street on the east side of Clark street when he saw a man running after and endeavoring to jump on a northbound Clark street car; that at the time this man reached the car it was about 40 feet north of Madison street; that in an attempt to get thereon the man referred to missed his footing and fell from the car; that the car was moving fast at the time of the accident. This witness was unable to fix the

plaintiff told him at the hospital that he, plaintiff, was injured while getting on a moving car.

A police officer [illegible] testified that he was riding upon the rear end of [illegible] car in question at the time the accident occurred. [illegible] the car [illegible] the north crossway of Madison street and [illegible] asked the man a man, who was standing at the northeast corner of the intersection, attempt to board the car as it [illegible] north on Clark street; that the car [illegible] both ways, one [illegible] center of the platform and one in the [illegible] feet were on the step. When he [illegible] the plaintiff denied the conversations testified to by the police officers.

The conductor of the street car in question testified that he was busy collecting fares [illegible] up across Madison street, [illegible] ring and as he was collecting his fares he [illegible] a man running. "He was just across [illegible] when I saw him. [illegible] and he either missed his footing [illegible] actly how he came [illegible] that plaintiff [illegible] north of the north crossway of [illegible] street.

A witness named [illegible] said that he was standing on [illegible] of Clark street when he saw a man [illegible] to jump on a northbound Clark street car; that [illegible] this man reached the car it was about [illegible] that in an attempt to get [illegible] footing and fell from the car; that the car was moving [illegible] the time of the accident. This witness [illegible]

time of the accident or to identify the man whom he saw attempt to get on the car. He did, however, identify a personal card which he said he gave either to a police officer or to the conductor of the car at the time of the accident.

A witness named Leitch testified that he was on the northwest corner of Madison and Clark streets at the time of the accident when he saw a man start to run for a car; that when the man just about got to the car he slipped and fell; that at this time the car was from 30 to 50 feet north of Madison street.

Five witnesses who testified for defendants stated that the accident occurred north of Madison street and that plaintiff attempted to get upon the car in question while it was moving on Clark street in a northerly direction. If the testimony of these witnesses is to be believed, the plaintiff's own negligence caused the accident in question. As against the testimony of these witnesses we have the testimony of the plaintiff and that of the witness Serviss, who was a passenger on the rear end of the platform of the car. These two witnesses testified positively that the plaintiff attempted to get upon the car while it was standing south of the south crosswalk of Madison street. We have thus a direct contradiction between the two classes of witnesses. There is no dispute in the evidence that the plaintiff fell from the step of the car after it had crossed Madison street. The theory of the plaintiff is that his hold on the rod of the car was broken by a violent jerking of the car as, or after, it crossed the car rails on Madison street. The testimony of the conductor of the car is that he was busy collecting fares before the car started up to cross Madison street; that at this time he heard the patter of feet on the pavement. Later in his testimony this witness said that he heard the patter

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in his testimony this witness said that he heard the motor

of feet when the car was 50 to 75 feet north of the north crosswalk of Madison street. One of the police officers testified that he saw the plaintiff fall from the car, but that he did not see him attempt to get thereon.

There is strong support in the evidence for the claim of defendants that the accident was caused by the negligence of the plaintiff in attempting to get upon the car while it was in motion and while it was north of the street intersection; the whole testimony however, is of such character that we are unable to say that the verdict of the jury is manifestly against the weight of the evidence. The jury and the trial Judge had an opportunity to see the witnesses and hear their testimony and were in a much better position to judge of their credibility than are we who have only a written record of the trial before us.

> "A verdict, sanctioned by the trial judge, who heard and saw the witnesses and had many other opportunities of testing the weight their testimony was properly entitled to, which a reviewing court does not possess, should not be disturbed except upon satisfactory evidence that injustice has been done." (Western Electric Co. v. Parish, 83 Ill. App. 210.)

While it is the duty of this court to examine and weigh the evidence introduced upon the trial, we are not permitted to substitute our judgment for that of the jury upon questions of fact, unless it appears on the whole evidence that the verdict of the jury is manifestly wrong.

It is urged that the court erred in the admission of certain evidence.

There is some evidence in the record which tends to prove that the plaintiff had suffered certain epileptic attacks and that these attacks were caused by the injuries which plaintiff received at the time of the accident. Dr. Mix and Dr. Krohn testifying for defendants gave it as their opinion that the epileptic attacks suffered by plaintiff could not

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It is urged that the court erred in the admission of certain evidence.

There is some evidence in the record which tends to prove that the plaintiff had suffered certain epileptic attacks and that these attacks were caused by the injuries which plaintiff received at the time of the accident. Dr. Fix and Dr. Krohn testifying for defendants were of the opinion that the epileptic attacks suffered by plaintiff could not

have been caused by the accident or the injuries received therein, and on their direct examination they testified that their opinion was based upon their own experience. Both of these witnesses on cross examination testified in effect that to some extent their opinion was based upon their knowledge of the literature of their profession. Dr. Mix on cross-examination said, "I base it upon things that have been taught me and that which I have already observed." He was asked the question:

> "So you are of that opinion -- so you are entirely independent of what other medical men, who have devoted their time to it, have written and said upon this subject?"

and he answered thereto:

> "No, I should say that on the contrary, so far as I know, most medical men agree with me, if you want to put it in that way."

Dr. Krohn was asked:

> "Do you base your opinion in any part upon what medical authorities have written upon general epilepsy?"

to which he answered:

> "Some general reading, I have kept in touch with the subject by general reading, but I depend chiefly on my own experience and observation.

In Wilcox v. International Harvester Co., 278 Ill., 465, the Supreme Court said:

> "Having expressed an opinion upon a matter material to the issue, a medical expert witness may be cross-examined as to whether that opinion is based upon personal experience or upon books which he has read, and this whether he has stated in his direct examination the basis of his opinion. Should he testify for the first time upon cross-examination that his opinion is based upon what he has read, counsel has the same right to interrogate him as to the authorities upon which he relies, and then contradict him with those authorities, if he can, the same as if he had testified in direct examination that his opinion was based upon such authorities. The mere fact that the witness on direct examination has expressed his opinion generally will not foreclose counsel, upon cross-examination, from eliciting from the witness the basis of his opinion."

have been caused by the accident or the injuries received therein, and on their direct examination they testified that their opinion was based upon their own experience. Yet, if these witnesses on cross examination testified that to some extent their opinion was based upon their knowledge of the literature of their profession. Dr. Fix on cross-examination said, "I base it upon things that have been taught me and that which I have already observed." He was asked the question:

> "Do you are of that opinion -- do you are entirely independent of what other medical men, who have devoted their time to it, have written and said upon this subject?"

and he answered thereto:

> "No, I should say that, on the contrary, so far as I know, most medical men agree with me, if you want to put it in that way."

Dr. Krohn was asked:

> "Do you base your opinion in any part upon what medical authorities have written upon epilepsy?"

to which he answered:

> "Some general reading, I have kept in touch with the subject by general reading, but . do and chiefly on my own experience and observation.

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While it is apparent that the witnesses based their opinion in the main upon their observation and experience, it does appear that these opinions were not wholly independent of the knowledge gained by reading the literature of their profession. The court did not err in permitting counsel for plaintiff to cross-examine the witnesses concerning their knowledge of the opinions of medical writers.

We do not believe that the court erred in giving instruction No. 4 as urged by defendant's counsel.

There was some evidence introduced on the trial which tended to prove that the defendants caused the car in question to start and move forward suddenly and violently, as the result of which the plaintiff was injured. Nor do we think that the court erred in its refusal to direct a verdict in favor of defendants on the first and third counts of plaintiff's declaration.

We think there is much force, however, in the contention that the verdict of $3,500 in favor of plaintiff is disproportionate with the injuries which it is shown by the evidence he sustained as the result of the accident. A preponderance of the evidence shows that plaintiff sustained an injury on the back of his head which he and other witnesses describe as a bump; that following the injury for about six weeks he was unable to sit up; that he gradually grew stronger until at the end of six months he was able to go to work, and that about three weeks after the accident he had incontinence of the urine which continued for about three weeks; that he also had the convulsive attacks referred to. Plaintiff's doctor is directly contradicted by the plaintiff himself, who says that he never claimed to have certain injuries which his doctor says he complained of to him. These witnesses directly contradict each other in important particulars with

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We think there is much force, however, in the contention that the verdict of $5,000 in favor of plaintiff is disproportionate with the injuries which it is shown by the evidence he sustained as the result of the accident. A preponderance of the evidence shows that plaintiff sustained an injury on the back of his head which he and other witnesses describe as a bump; that following the injury for about six weeks he was unable to sit up; that he gradually grew stronger until at the end of six months he was able to go to work, and that about three weeks after the accident he had incontinence of the urine which continued for about three weeks; that he also had the convulsive attacks referred to. Plaintiff's doctor is directly contradicted by the plaintiff himself, who says that he never claimed to have certain injuries which his doctor says he complained of to him. These witnesses directly contradict each other in important particulars with

reference to plaintiff's condition following the date of the accident. The only permanent injury that plaintiff complains of is that of some deafness in the left ear. He says that his eyesight has not been affected at all, and we are inclined to accept his statement in preference to that of his doctor, whose testimony is not at all impressive. The plaintiff lost six months' employment. He testified that except for the deafness referred to he has sustained no permanent injuries as the result of the accident. "Nothing in any other respect, but that my hearing was bad * * * is absolutely the only complaint I am making now." When working at his occupation as a bartender plaintiff's salary was about $22 a week, and his doctor testified that he rendered services to plaintiff of the value of $75.

The verdict of the jury and judgment of the trial ocurt is excessive.

The judgment of the trial court will be reversed and the cause remanded to that court for a new trial unless the plaintiff within ten days shall file in this court a remittitur of his judgment in the sum of $2,500, in which case the judgment shall be affirmed for $1,000.

JUDGMENT AFFIRMED ON REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

reference to plaintiff's condition following the date of the accident. The only permanent injury that plaintiff complains of is that of some deafness in the left ear. He says that his eyesight has not been affected at all, and we are inclined to accept his statement in preference to that of his doctor, whose testimony is not at all impressive. The plaintiff lost six months' employment. He testified that except for the deafness referred to he has sustained no permanent injuries as the result of the accident. "Nothing in any other respect, but that my hearing was bad * * * is absolutely the only complaint I am making now." When working at his occupation as a bartender plaintiff's salary was about $22 a week, and his doctor testified that he rendered services to plaintiff of the value of $75.

The verdict of the jury and judgment of the trial court is excessive.

The judgment of the trial court will be reversed and the cause remanded to that court for a new trial unless the plaintiff within ten days shall file in this court a remittitur of his judgment in the sum of $4,500, in which case the judgment shall be affirmed for $1,000.

JUDGMENT AFFIRMED OR REMITTITUR;
OTHERWISE REVERSED AND REMANDED.

30 - 23651

212 I.A. 648

CHARLES FRITZ,
Appellee,

vs.

F. W. HOCHSPEIER COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action in tort brought by plaintiff against the appellant and the Chicago Railways Company, Chicago City Railway Company and August Hinze, to recover damages for personal injuries suffered by plaintiff while riding in an automobile which came into collision with a street car owned or operated by certain of the defendants, the automobile being owned by defendant Hochspeier Company and operated by its servant. On a trial before court and jury there was a finding of not guilty as to all defendants except appellant, who was found guilty and against whom the damages were assessed at $2500. A judgment on the verdict being entered, appellant brings the record here for review on appeal.

The pleadings are somewhat lengthy and will be but briefly referred to, as they are not seriously in controversy except as hereinafter noted. In the first place, it is contended the action is ex contractu because in the declaration there is recited an agreement of hiring of the automobile which was wrecked in the collision. This recitation is simply a matter of inducement. The action is trespass on the case and is clearly a tort action, all the defendants being declared against as joint tort feasors. The action was tried on this theory, which defendants recognized

30 - 25851

CHARLES WHITE,
Appellee,

vs.

R. W. HOCHSPRIEN COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

21214 148

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action in tort brought by plaintiff against the appellant and the Chicago Railways Company, Chicago City Railway Company and August Hinze, to recover damages for personal injuries suffered by plaintiff while riding in an automobile which came into collision with a street car owned or operated by certain of the defendants, the automobile being owned by defendant Hochspeier Company and operated by its servant. On a trial before court and jury there was a finding of not guilty as to all defendants except appellant, who was found guilty and against whom the damages were assessed at $2500. A judgment on the verdict being entered, appellant brings the record here for review on appeal.

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by their pleadings. Appellant pleaded the general issue with pleas of non-ownership and non-operation of the automobile at the time of the accident.

In a tort action, as contradistinguished from an action ex contractu, more than one may be sued together as joint tort feasors, as in the case at bar, and in such case there may be a verdict and judgment against such of the defendants as the evidence may show guilty of the tort charged, which may be one or more. In actions ex contractu the rule is different. Where a joint liability is charged there must be a recovery against all or none, otherwise there will be a variance fatal to the judgment.

The first count is typical of all six; it alleges that appellant, the Hochspeier Company, was possessed of, owned and operated a business in which it let automobiles for hire; that the defendant, August Hinze, was in like business; that Hinze contracted with appellant, for a reward to be paid it, for the hire of one of its automobiles, in which was to be carried on a journey plaintiff and others; that Hinze rented of appellant such automobile, which was in charge of one of appellant's servants; that a part of the pay, reward or hire for the use of the automobile, contracted by Hinze to be paid to appellant, was to be retained and kept by Hinze, and that plaintiff was injured in a collision between the automobile of appellant and a certain street car.

It appears to us that our decision must turn upon the question as to whose servant was the driver of the automobile at the time of the accident.

The facts as developed by the evidence are substantially that defendant, August Hinze, owned a garage where he conducted the business of storing and renting au-

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It appears to us that our decision must turn upon the question as to whose servant was the driver of the automobile at the time of the accident.

The facts as developed by the evidence are substantially that defendant, August Hinze, owned a garage where he conducted the business of storing and renting au-

tomobiles under the name of the "Metropolitan Garage"; that appellant conducted an undertaking establishment in connection with which he rented automobiles for funerals and other purposes; that certain of these automobiles were kept at the garage of appellant, and others at Hinze's garage; that among these automobiles were two large machines, kept at Hinze's garage, which were used principally for funerals; that Hinze and appellant were members of an organization known as the Chicago Motor Liverymen's Association, under the rules of which Association a member unable to fill an order for an automobile was privileged to give the order to a fellow member. Tariffs for the use of automobiles were fixed by the Association, a printed copy of which was furnished each member. Under the rules of the Association bills were rendered to members who used the automobiles, to whom a discount of 10% was allowed if the bill was paid within thirty days. This gave to the member taking the order 10% of the list price and to the member furnishing the car 90% thereof. It seems that the secretary of a society, from its name evidently German, the "Schwabenverein," telephoned to the manager of Hinze's garage that he wanted an automobile to carry members of the society to Montrose cemetery. The reply was that the Hinze automobiles were busy, but the manager promised to arrange for a car elsewhere. The secretary testified, however, that he had no notice that Hinze would not send his own car. However that may be, Hinze's garage telephoned to appellant and engaged from it two cars for May 30, 1915, under the terms of the Chicago Motor Liverymen's Association rules, to fill the Hinze order. Hinze contends that he engaged the cars for no particular funeral and for no specified destination, although appellant's telephone

automobiles under the name of the "Metropolitan Garage"; that appellant conducted an undertaking establishment in connection with which he rented automobiles for funerals and other purposes; that certain of these automobiles were kept at the garage of appellant, and others at Hinze's garage; that among these automobiles were two large machines, kept at Hinze's garage, which were used principally for funerals; that Hinze and appellant were members of an organization known as the Chicago Motor Livery-men's Association, under the rules of which Association a member unable to fill an order for an automobile was privileged to give the order to a fellow member. Tariffs for the use of automobiles were fixed by the Association, a printed copy of which was furnished each member. Under the rules of the Association bills were rendered to members who used the automobile, to which a discount of 10% was allowed if the bill was paid within thirty days. This gave to the member taking the order 10% of the list price and to the member furnishing the car 90% thereof. It seems that the secretary of a society, from its name evidently German, the "Schwabenverein," telephoned to the manager of Hinze's garage that he wanted an automobile to carry members of the society to Lorraine cemetery. The reply was that the Hinze automobiles were busy, but the manager promised to arrange for a car elsewhere. The secretary testified, however, that he had no notice that Hinze could not send his own car. However that may be, Hinze's garage telephoned to appellant and engaged from it two cars for July 30, 1919, under the terms of the Chicago Motor Livery-men's Association rules, to fill the Hinze order. Hinze contends that he engaged the cars for no particular funeral and for no specified destination, although appellant's telephone

operator testified that it was her understanding that the two automobiles were to go to Forest Home cemetery. Appellant designated one Neuman to take an automobile to fill one of Hinze's orders. Hinze directed Neuman to take the automobile to the North Side Turner Hall for passengers and to drive them to Montrose cemetery and to bring the passengers back, according to custom. Plaintiff was a passenger in the automobile in question at the time of the accident while it was returning on the last mentioned day from the burial of a friend in Montrose cemetery. On the return trip from the cemetery Neuman, the driver, attempted to pass a buggy going in the same direction and struck its wheel, wrecking it, and in attempting to drive across the street car track in front of an approaching car the automobile was hit with great force by the street car, injuring plaintiff with others in the automobile and killing the driver, Neuman, and three other occupants.

We think the jury might properly find from the evidence in the record that Neuman, the driver, was the servant of appellant; that appellant paid him his wages and gave him directions regarding the driving and management of the automobile; that Neuman looked to and received from appellant his wages, and that appellant had the sole control of Neuman and was the only one who could discharge him from service. And they might further reasonably find that Hinze had no control over the automobile or its driver, Neuman, on the day in question, except to direct Neuman where to drive it.

There is likewise evidence in the record supporting the verdict of the jury that the accident was occasioned by the negligent driving of Neuman and that the street car people were not at fault or guilty of any negli-

operator testified that it was her understanding that the two automobiles were to go to Forest Home cemetery. Appellant designated one Neuman to take an automobile to fill one of Hinze's orders. Hinze directed Neuman to take the automobile to the North Side Turner Hall for passengers and to drive them to Montrose cemetery and to bring the passengers back, according to custom. Plaintiff was a passenger in the automobile in question at the time of the accident while it was returning on the last mentioned day from the burial of a friend in Montrose cemetery. On the return trip from the cemetery Neuman, the driver, attempted to pass a buggy going in the same direction and struck the wheel, wrecking it, and in attempting to drive across the street car track in front of an approaching car the automobile was hit with great force by the street car, injuring plaintiff with others in the automobile and killing the driver, Neuman, and three other occupants.

We think the jury might properly find from the evidence in the record that Neuman, the driver, was the servant of appellant; that appellant paid him his wages and gave him directions regarding the driving and management of the automobile; that Neuman looked to and received from appellant his wages, and that appellant had the only control of Neuman and was the only one who could discharge him from service. And they might further reasonably find that Hinze had no control over the automobile or its driver, Neuman, on the day in question, except to direct Neuman [illegible] drive it.

There is likewise evidence in the record sanctioning the verdict of the jury that the accident was occasioned by the negligent driving of Neuman and that the street car people were not at fault or guilty of any negli-

gence which caused the accident; and we think the jury might further reasonably find from the evidence that the automobile was hired generally to be sent out upon the direction of Hinze, or that it was hired to make the journey to Montrose cemetery and not to Forest Home cemetery, as contended for by appellant; and in either event appellant would be liable in this action for the injuries sustained by plaintiff as the result of the negligence of appellant's driver.

The plaintiff was injured while riding in an automobile driven by the servant of appellant through the negligent driving of such servant. Under the circumstances of the hiring of the automobile, appellant owed the duty to plaintiff, notwithstanding he was a stranger to the hiring, to so carry him that he would not be injured through the negligent conduct of appellant's servant in charge of the automobile.

These questions of fact being settled as indicated, the legal principle applicable to fix the liability of appellant is that of respondeat superior, the test being whether the servant was in the employ and under the control, dominion and direction of the master from whom he received his wages, and who had the authority to discharge him from his employment at the time of the accident. Consolidated Fireworks Co. v. Koehl, 190 Ill. 145; Harding v. St. Louis Stock Yards, 242 ibid 444; Connolly v. Peoples Gas Light & Coke Co., 260 ibid 162. This principle is well expressed in Driscoll v. Towle, 181 Mass. 416, where Holmes, C. J., said:

gence which caused the accident; and we think the jury might further reasonably find from the evidence that the automobile was hired generally to be sent out upon the direction of Hines, or that it was hired to make the journey to Mount Rose cemetery and not to Forest View cemetery, as contended for by appellant; and in either event appellant would be liable in this action for the injuries sustained by plaintiff as the result of the negligence of appellant's driver.

The plaintiff was injured while riding in an automobile driven by the servant of appellant through the negligent driving of such servant. Under the circumstances of the hiring of the automobile, appellant owed the duty to plaintiff, notwithstanding he was a stranger to the hiring, to so carry him that he would not be injured through the negligent conduct of appellant's servant in the use of the automobile.

These questions of fact [illegible] indicated, the legal proposition applicable to the liability of appellant is that of respondent superior, the test being whether the servant was in the employ and under the control, domination and direction of the [illegible] received his wages, and who had the right to discharge him from his employment at the time of the accident. Consolidated Rivers Co. v. Koehl, [illegible]; Gooding v. St. Louis Stock Yards, 242 [illegible]; Consolidated Gas Light & Coke Co., [illegible] 1 [illegible] well expressed in Driscoll v. Towle, 181 [illegible], [illegible] O. J., said:

> "In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that burden, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who pays him. Therefore he can make no one else liable if he negligently runs a person down in the street."

In the case of Hirshberger v. Lynch, 9 Sadler 91, the court said:

> "Where a carriage and horses are the property of a livery stable keeper and the driver is in his general service, and the driver, carriage and horses are temporarily engaged in the service of an undertaker and under his direction and control, the livery stable keeper is legally liable for the negligence of the driver while so employed."

Interpolating into this quotation "automobile" for "carriage and horses" we have a statement of the law applicable to the facts in the instant case.

If the jury had believed the contention of appellant that Neuman at the time of the accident was the servant of Hinze, then it would have been their duty to have found by their verdict that the defendant Hinze was responsible to plaintiff for his injuries. Not having done so, we assume that they concluded, as they properly might from the proofs, that Neuman, the driver, was the servant of appellant at the time of the accident.

It follows from what we have heretofore said that there was no tortious conversion of the automobile by defendant Hinze so as to make him the owner pro hac vice.

Complaint is made by appellant of the refusal of the trial Judge to give certain instructions. We have examined all the instructions found in the record - and they are numerous, exceeding forty in number - from which we think the court gave sufficient of them to fairly inform the jury as to the law applicable to the facts in evidence. Some of

"In cases like the present, there is a general consensus of authority that, although a driver may be ordered by those who have dealt with his master to go to this place or that, to take this or that bridge, to hurry or to take his time, nevertheless in respect to the manner of his driving and the control of his horse he remains subject to no orders but those of the man who owns him. Therefore he can make no one else liable if he negligently runs a person down in the street."

In the case of Hirshberger v. Lyon, a hauler of

of, the court said:

"Where a carriage and horses are the property of a livery stable keeper and the driver is in his general service, and the driver, carriage and horses are temporarily engaged in the service of an undertaker and under his direction and control, the livery stable keeper is legally liable for the negligence of the driver while so employed."

Interpolating into this quotation "automobile" for "carriage and horses" we have a statement of the law applicable to the facts in the instant case.

If the jury had believed the contention of appellant that Newman at the time of the accident was the servant of Hines, then it would have been their duty to have found by their verdict that the defendant Hines was responsible to plaintiff for his injuries. Not having done so, we assume that they concluded, as there is ample right from the proofs, that Newman, the driver, was the servant of appellant at the time of the accident.

It follows from what we have hereto re said that there was no tortious conversion of the automobile by defendant Hines so as to make him the owner in the

vice.

Complaint is made by appellant of the refusal of the trial judge to give certain instructions. We have examined all the instructions found in the record - they are numerous, exceeding forty in number - from which we think the court gave sufficient of them to fully inform the jury as to the law applicable to the facts in evidence. Some of

the instructions refused were predicated upon facts assumed, which find no support in the proofs.

Finding no reversible error in the record, the judgment of the Superior Court is affirmed.

AFFIRMED.

The instructions refused were predicated upon facts assigned, which find no support in the proofs.

Finding no reversible error in the record, the judgment of the superior Court is affirmed.

AFFIRMED.

29 - 23585

212 I.A. 648

CHARLES FRITZ,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,
F. W. HOCHSPEIER COMPANY, et al.,
Defendants in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This writ of error was consolidated for hearing with appeal case general number 23651, Charles Fritz v. F. W. Hochspeier Company, in which case an opinion is this day handed down affirming the judgment of the trial court.

The decision in that case automatically disposes of this writ of error, and the judgment of the Superior court is again affirmed.

AFFIRMED.

29 - 25885

CHARLES PRITZ,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY
R. M. ROCHELLER COMPANY, et al.,
Defendants in Error.

212 I.A. 648

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE MCBRIDE DELIVERED THE OPINION OF THE COURT:

This writ of error was consolidated for hearing with appeal case General number 25881, Charles Pritz v. R. M. Rocheller Company, in which case an opinion is this day handed down affirming the judgment of the trial court.

The decision in that case substantially disposes of this writ of error, and the judgment of the superior court is again affirmed.

AFFIRMED.

31 - 23652

212 I.A. 648

GEORGE EBERSPACHER,
Appellee,

vs.

F. W. HOCHSPEIER COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In this case there was a verdict and judgment of $500, and defendant appeals.

The verdict and judgment in this case were arrived at in the trial court upon the same evidence and rendered by the same jury, by the consent of the parties as in the Fritz case, general number 23651. The plaintiff in this case was injured at the same time and in the same automobile and under the same circumstances as was the plaintiff in the Fritz case, and the liability and responsibility of each of the parties to the other were the same. What has been said in an opinion coincidentally rendered with this in the Fritz case is equally applicable on fact and legal principle to the instant case and is decisive of all the questions raised on this appeal.

For the reasons set forth in the opinion in the Fritz case supra the judgment of the Superior court is affirmed.

AFFIRMED.

31 - 23652

GEORGE MERRAFAUNTER,
Appellee,

vs.

E. W. HOCHSTEADT COMPANY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

P12IA. 648

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

In this case there was a verdict and judgment of $500, and defendant appeals.

The verdict and judgment in this case were arrived at in the trial court upon the same evidence and rendered by the same jury, by the consent of the parties as in the Fritz case, ante, p. 555. The plaintiff in this case was injured at the same time and in the same automobile and under the same circumstances as was the plaintiff in the Fritz case, and the liability and responsibility of each of the parties to the other were the same. What has been said in an opinion just otherwise rendered upon this in the Fritz case is equally applicable in fact and legal principle to the instant case and is decisive of all the questions raised on this appeal.

For the reasons set forth in the opinion in the Fritz case supra the judgment of the superior court is affirmed.

AFFIRMED.

28 - 23584

212 I.A. 649

GEORGE EBERSPACHER,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAYS COMPANY et al.,
Defendants in Error.

ERROR TO SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This writ of error was consolidated for hearing with appeal case general number 23652, George Eberspacher v. F. W. Hochspeier Company. In the appeal case the judgment of the Superior court has been affirmed.

For the reasons set forth in an opinion this day filed in the Fritz case, general number 23651, all the questions arising on this writ of error having been there decided, nothing is left for our further consideration, and the judgment of the Superior court is again affirmed.

AFFIRMED.

28 - 23564

GEORGE ZEEGER,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAYS COMPANY et al.,
Defendants in Error.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

This writ of error is dismissed for want of jurisdiction.

The writ applies to case general number 23564, George Zeeger v. Chicago City Railway Company. In the appeal case the judgment of the Superior court has been affirmed.

For the reasons set forth in an opinion on this day filed in the Frick case, general number 23564, all the questions arising on this writ of error having been there decided, nothing is left for our further consideration, and the judgment of the Superior court is again affirmed.

AFFIRMED.

173 - 24094

FRANK GLOMBICKI,
Appellee,

vs.

CHICAGO PACKING COMPANY,
Appellant.

212 I.A. 649

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an action on the case for personal injuries which was tried before court and jury, resulting in a verdict and judgment thereon of $6750, from which judgment defendant prosecutes this appeal.

The cause went to trial upon two additional counts, the original counts being eliminated from the case. One of these counts charges that defendant owned a packing house plant at Union Stock Yards, Chicago; that it held itself out to the public as selling at wholesale and retail meats and other packing house products; that plaintiff was a butcher at retail; that upon the invitation of defendant he went into its building for the purpose of purchasing meat, etc., and that the defendant then and there negligently, wrongfully, carelessly and improperly maintained said store and premises in said building in a dangerous and defective condition, in this, that the same were poorly lighted and the place there was dark so that when the plaintiff entered the premises and opened a certain door, expecting to go to another room of said premises where defendant's meats and other products were kept, he fell down a certain opening or elevator shaft a distance of to-wit, 12 feet; that plaintiff was at all times in the exercise of due care and caution for his own safety and that as a result of plaintiff's fall occurring through defendant's alleged negligence, he was injured and was prevented from transacting his usual affairs

173 - 24094

FRANK GLOMSKINI,
Appellee,

vs.

CHICAGO PACKING COMPANY,
Appellant.

212 I.A. 649

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an motion or the case for personal injuries which was tried before court and jury, resulting in a verdict and judgment thereon of $2750, from which judgment defendant prosecutes this appeal.

The cause went to trial upon two additional counts, the original counts being eliminated from the case. One of these counts charges that defendant owned a packing house plant at Union Stock Yards, Chicago; that it sold itself out to the public as selling at wholesale and retail meats and other packing house products; that plaintiff was a butcher at retail; that upon the invitation of defendant he went into its building for the purpose of purchasing meat, etc., and that the defendant then and there negligently, wrongfully, carelessly and improperly maintained said store and premises in said building in a dangerous and defective condition, in this, that the same were poorly lighted and the place there was dark so that when the plaintiff entered the premises and opened a certain door, expecting to go to another room of said premises where defendant's meats and other products were kept, he fell down a certain opening or elevator shaft a distance of 10-ft, 12 feet; that plaintiff was at all times in the exercise of due care and caution for his own safety and that as a result of plaintiff's fall occurring through defendant's alleged negligence, he was injured and was prevented from transacting his usual affairs

and business; that he lost great gains and profits which he otherwise would have made and was otherwise greatly damaged.

The other count was similar in its averments of negligence, care and damage, with the additional charge that there was in force and effect in Chicago a certain valid ordinance which provided that:

> "All hoistways, hatchways, elevator wells and wheel holes in factories, mercantile establishments, mills, or workshops, shall be securely fenced, inclosed or otherwise safely protected, and due diligence shall be used to keep all such means of protection closed except when it is necessary to have the same open, in order that the said hatchways, elevators or hoisting apparatuses may be used."

And it was charged in this count that defendant negligently, carelessly, wrongfully and improperly, and in violation of the ordinance, failed and neglected to keep its said hoistways, hatchway or elevator well inside its premises securely fenced, inclosed or safely protected, or to use such diligence to keep such means of protection closed, but on the contrary thereof suffered, permitted and allowed its said hoistway, hatchway and elevator well to remain open and unprotected and unguarded, when it was not necessary to have same open in order to use said elevator, so that when plaintiff, in the exercise of due care for his own safety, walked from the outside door of defendant's said premises in said dark room, he was caused to and did because of defendant's negligence, fall into said open and unguarded hoistway, hatchway and elevator well, and was then and there caused to fall down into the same a distance of twelve feet, etc.

To these two counts defendant pleaded the general issue.

At the conclusion of plaintiff's case in chief defendant made a motion in writing for a directed verdict and tendered the usual written instruction for that purpose, which motion the court denied.

and business; that he lost great gains and profits which he otherwise would have made and was otherwise greatly damaged.

The other count was similar in its averments of negligence, care and damage, with the additional charge that there was in force and effect in Chicago a certain valid ordinance which provided that:

> "All hatchways, hatchways, elevator wells and wheel holes in factories, department establishments, mills, or workshops, shall be securely fenced, inclosed or otherwise safely protected, and due diligence shall be used to keep all such means of protection closed except when it is necessary to have the same open, in order that the said hatchways, elevators or hoisting apparatus may be used."

An [illegible] was charged in this count that defendant negligently, carelessly, wrongfully and improperly, and in violation of the ordinance, failed and neglected to keep its said hatchways, hatchway or elevator well inclosed in a reasonably fenced, inclosed or safely protected, or to use such diligence to keep such means of protection closed, but on the contrary thereof suffered, permitted and allowed its said hatchway, hatchway and elevator well to remain open and unprotected and unguarded, when it was not necessary to have the same open in order to use said elevator, or [illegible] purpose; in the exercise of the care for his own safety, walked from the outside door of [illegible] room, he was caused to and did [illegible] negligence, fall into said open and unprotected hatchway, hatchway and elevator well, and was [illegible] to fall down into the same a distance of [illegible] feet.

To these two counts defendant filed the general issue.

At the conclusion of plaintiff's case in chief defendant made a motion in writing for a directed verdict and tendered the usual written instruction for that purpose, which motion the court denied.

The plaintiff was a witness in his own behalf, and his narration of the occurrences leading to the accident is in brief as follows:

He was 39 years of age, born in Poland; had been in the retail butcher business for five years at 4852 South Racine avenue, Chicago. He went out and bought his own meat and hauled it in his horse and wagon. Before the day of the accident he had bought his meat at packing houses other than defendant's. On the day of the accident he drove in at a gate on Gross avenue and backed his wagon up to the platform of defendant's place about 15 feet from the door; he alighted from his wagon onto the platform and saw two men dressed in white coats standing near the door, one about a foot away, the other a little farther. He greeted these men by saying, "How do you do?" and they answered, "Hello, how do you do?" and he replied, "I want to buy some meat," and they told him to "Go inside and go to the cooler and you can see the meat." He told them he wanted to buy "pork butts." The hour was about noon, when most of the employees went to luncheon. After this colloquy plaintiff went into the building and noticed some barrels which were near the elevator door and about forty or fifty feet from the door through which he entered the building. There was no light inside except daylight; it was dark, not dark like nighttime, but dark. When he got near the barrels he noticed that the door was some distance open, and then he grabbed the door. He thought he was going to the cooler, as these two men told him he should go to the cooler; the door was open about 12 or 15 inches. He did not see any white or red light by this door. As he opened the door he made one step and his foot fell and the other foot slipped up, and "bang, I went down." He had never been in the building before. It was dark in the place where he fell. A man

The plaintiff was a witness in his own behalf, and his narration of the occurrences leading to the accident is in brief as follows:

He was 39 years of age, born in Ireland; had been in the retail butcher business for five years at 48[illegible] South Racine avenue, Chicago. He went out and bought his own meat and hauled it in his horse and wagon. Before the day of the accident he had bought it near at [illegible] houses further than defendant's. On the day of the accident he drove in a gate on Green avenue and backed his wagon up to the platform of defendant's place about 15 feet from the door. He alighted from his wagon onto the platform and her two men dressed in white coats standing near the door, one about a foot away, the other a little farther. He greeted them by saying, "How do you do?" and they answered, "[illegible], how do you do?" and he replied, "I want to buy some meat," and they told him to "Go inside and get the cooler and you can see the meat." He told them he wanted to buy "pork butts." The hour was about noon, when most of the employees went to luncheon. After this colloquy plaintiff went into the building and [illegible] barrels which were near the door [illegible] fifty or fifty feet from the door through which [illegible] building. There was no light inside except [illegible]; it was [illegible] not dark like [illegible], but [illegible]. [illegible] testifies he noticed that the door was [illegible], and when he grabbed the door [illegible] so the door was [illegible] door was [illegible] white or red light by the door. [illegible] made one step, and his foot fell and he [illegible] up, and "bang, I went down." He had never been in the [illegible] ing before. It was dark in the [illegible]. A man

came down and lit a match and looked at him and then two men came down with lanterns and carried him up, and he was taken to the hospital to be treated for his injuries. Plaintiff was about five feet six and one half inches tall and weighed about 195 pounds. He did not notice whether there was a double door or not. He grabbed hold with the right hand and pushed one of the doors away. He did not open the door toward him, but pushed it away from him. He was going reasonably quick, as it was after twelve o'clock and he was in a hurry. He did not look for any other door. Plaintiff was asked these questions: "When you opened the door did it look dark or light inside?" and he answered, "There was no light at all." He was then asked, "Did you stop at all after you opened the door?" and he answered, "If I had stopped I would not have fallen in. **" He did not see any electric lights around there at all.

It is in evidence uncontradicted that during the noon luncheon hour the lights in the establishment of defendant were turned out, during which time business was mostly suspended. Plaintiff started to go into a meat cooler of defendant to look at some meat in a place that was dark and to which he was a stranger. He proceeded in his own way in the dark and of his own volition opened a door leading into an elevator, with the result that he fell in and injured himself. On this elevator was a sign, "ELEVATOR - DANGER", in big black letters. In going to the elevator he passed the doors to the cooler.

It is therefore clear that plaintiff was not only guilty of contributory negligence, but of reckless conduct in walking into and about a place which was dark and opening the first door he stumbled onto and attempting to step through such door into a dark space without any effort

came down and lit a match and looked at him and then two men came down with lanterns and carried him up, and he was taken to the hospital to be treated for his injuries. Plaintiff was about five feet six and one half inches tall and weighed about 195 pounds. He did not notice whether there was a double door or not. He grabbed hold with the right hand and pushed one of the doors away. He did not open the door toward him, but pushed it away from him. He was going reasonably quick, as it was after twelve o'clock and he was in a hurry. He did not look for any other door. Plaintiff was asked these questions: "When you opened the door did it look dark or light inside?" and he answered, "There was no light at all." He was then asked, "Did you stop at all after you opened the door?" and he answered, "If I had stopped I would not have fallen in." He did not see any electric lights around there at all.

It is in evidence uncontradicted that during the noon luncheon hour the lights in the establishment of defendant were turned out, during which time business was mostly suspended. Plaintiff started to go into a most secluse of defendant to look at some meat in a place that was dark and to which he was a stranger. He proceeded in his own way in the dark and of his own volition opened a door leading into an elevator, with the result that he fell in and injured himself. On this elevator was a sign, "ELEVATOR - DANGER", in big block letters. In going to the elevator he passed the doors to the cooler.

It is therefore clear that plaintiff was not only guilty of contributory negligence, but of reckless conduct in walking into and about a place which was dark and opening the first door he stumbled onto and attempting to step through such door into a dark space without any effort

to inform him as to where he was going. This negligence of plaintiff was, aside from every other condition environing him, the proximate cause of the accident.

The testimony shows that one of the elevator doors was slightly open, not sufficient even, according to plaintiff's own evidence, to admit of his body passing through it without enlarging the opening. He voluntarily opened the elevator door sufficiently wide to admit the passage of his body, and fell.

The protection to the elevator shaft did not violate the city ordinance. The condition of the doors of the elevator was not the proximate cause of the accident to plaintiff; it was not even a remote or slightly contributing cause. The cause of the accident was plaintiff's negligently opening the door without informing himself as to where it led and stepping into a dark place, which proved to be the well hole of the elevator.

At the close of plaintiff's case a motion by defendant to instruct a verdict in its favor should have been allowed.

Sauter v. Hinde, 183 Ill. App. 413, is a case on fact and principle analogous to the one now under consideration. In the Sauter case the plaintiff entered a building with which she was unfamiliar, knowing nothing about its entrances, all of which were dark, she testifying, "I fancied I could see the stairs leading up and I put my foot out and overbalanced myself and went down. I could not see anything over the stairway; there was no barrier; there was nothing at all, no light, it was just dark," and the court said:

> "Without being able to see that it was a stairway (she) rushed, as we think, recklessly into danger without stopping and exploring the place either by reaching down and feeling to see if it was a stairway, or carefully ex-

to inform him as to where he was going. This negligence of plaintiff was, aside from every other condition surrounding him, the proximate cause of the accident.

The testimony shows that one of the elevator doors was slightly open, not sufficient even, according to plaintiff's own evidence, to admit of his body passing through it without enlarging the opening. He voluntarily opened the elevator door sufficiently wide to admit the passage of his body, and fell.

The protection to the elevator shaft did not violate the city ordinance. The condition of the doors of the elevator was not the proximate cause of the accident to plaintiff; it was not even a remote or slightly contributing cause. The cause of the accident was plaintiff's negligently opening the door without informing himself as to where it led and stepping into a dark place, which proved to be the well-hole of the elevator.

At the close of plaintiff's case a motion by defendant to instruct a verdict in its favor should have been allowed.

Sauter v. Hinde, 188 Ill. App. 413, is a case on fact and principle analogous to the one now under consideration. In the Sauter case the plaintiff entered a building with which she was unfamiliar, knowing not one about its surroundings, all of which were dark, she testifying, "I thought I could see the stairs leading up and I put my foot out and overbalanced myself and went down. I could not see anything over the stairway; there was no bannister, there was nothing at all, no light, it was just dark," and the court said:

"Without being able to see that it was a stairway and feeling to see if it was a stairway, or carelessly except stepping and exploring the place either by reaching down the way (she) ranged, as we think, recklessly into deeper obscurity

tending her foot to feel if there was a riser just in advance of her, or lighting a match or doing any of those things which a reasonably prudent person would do before proceeding too far, advanced to the opening without hesitating for more than one second, raised her foot as if to put it on the stairway, lost her balance and went down. If, owing to the darkness she was unable to perceive that the place she was about to enter was a stairway, then it seems to us only reasonable that she should have refused to proceed further until she determined with some degree of certainty the kind of a place she was about to enter."

In Wheeler v. Hotel Stevens, 127 Pac. 840, the court said:

"If the appellant opened a substantially closed door for the purpose of entering an elevator and stepped into the elevator shaft, she was so clearly guilty of contributory negligence that it would seem that the minds of reasonable men could hardly differ upon that question."

As said by this court in Ross v. Becklenberg, in an opinion by Mr. Justice McSurely, case Gen. No. 23099, not yet reported -

"We are of the opinion that all reasonable minds would agree that it was negligence for anyone to grope his way in the darkness through a building in course of erection, into a passageway through which he had not before walked and which from previous observation he knew was devoid of flooring. Under such circumstances it would be a matter of wonder if plaintiff did not meet with an accident. Among the cases supporting this view, involving circumstances very similar to those here present, are Bentley & Gerwig v. Loverock, 102 Ill. App. 186; Heide v. Schubert, 166 Ill. App. 586; Sauter v. Hinde, 183 Ill. App. 413; Darrow v. The Fair, 118 Ill. App. 665."

These observations are equally applicable to plaintiff's action at the time he was injured. It cannot be disputed that if plaintiff had made the most casual examination before stepping into the elevator shaft he would not have done so. The striking of a match or even extending his hand or foot upon the floor beyond the door of the elevator would have at once disclosed to him the danger which confronted him. Moreover, what plaintiff did he did of his own volition. He does not claim to have been directed by anyone of defendant's employees, or for that matter, by anybody else, to the place where he was injured. He proceeded in his own way

touching her foot to feel if there was a riser just in advance of her, or limiting a match or using any of those things which a reasonably prudent person would do before proceeding too far, advanced to the opening without hesitating for more than one second, raised her foot as if to put it on the stairway, lost her balance and went down. If, owing to the darkness she was unable to perceive that the place she was about to enter was a stairway, then it seems to us only reasonable that she should have refused to proceed further until she determined with some degree of certainty the kind of a place she was about to enter."

In Wheeler v. Hotel Stevens, 127 Ind. App. 86, the court said:

"If the door that opened a substantially closed door for the purpose of entering an elevator and stepped into the elevator shaft, she was of clearly quality of contributory negligence that it could seem that the minds of reasonable men could hardly differ upon that question."

As said by this court in Moss v. Eckhardt, in an opinion by Mr. Justice Hourigny, case No. 20,[illegible], not yet reported -

"We are of the opinion that all reasonable minds would agree that it was negligence for anyone to trope his way in the darkness through a building in course of erection, into a passageway through which he had not before walked and which from previous observation he knew was devoid of flooring. Under such circumstances it would be a matter of wonder if plaintiff did not meet with an accident. Among the cases supporting this view, involving circumstances very similar to those here presented, are Hartley v. Swift & Co., 170 Ill. App. 169; Teale v. Schubert, 166 Ill. App. 588; Hunter v. Kinde, 189 Ill. App. 416; Dawson v. [illegible], 111 Ill. App. 75."

These observations are equally applicable to plaintiff's action at the time he [illegible]. It cannot be disputed that if plaintiff had [illegible] cast aside, examination before stepping into the elevator, [illegible] would not have done so. The striking of a match or even extending his hand or foot upon the floor beyond the [illegible] the elevator would have at once disclosed to him the danger which confronted him. Moreover, what plaintiff did [illegible] his own volition. He does not claim to have been directed by anyone of defendant's employees, or for that matter, by anybody else, to the place where he was injured. He proceeded in his own way

through the darkness without any attempt on his part to inform himself as to where he was going, and recklessly opened the elevator door on the assumption that he was going into the cooling room. This conduct was inexcusable negligence.

While plaintiff was lawfully upon defendant's premises at the time of the accident, the law does not hold defendant to the duty of protecting plaintiff against his own negligent conduct.

The accident to plaintiff with the resulting injuries to him are chargeable not to the negligence of defendant, but to that of the plaintiff. It follows that he is not entitled to recover in this action, and therefore the judgment of the Circuit court is reversed with a finding of fact.

REVERSED WITH FINDING
OF FACT.

(Over.)

through the darkness without any attempt on his part to inform himself as to where he was going, and recklessly opened the elevator door on the assumption that he was going into the ceiling room. This conduct was inexcusable negligence.

While plaintiff was lawfully upon defendant's premises at the time of the accident, the law does not hold defendant to the duty of protecting plaintiff against his own negligent conduct.

The accident to plaintiff with the resulting injuries to him are chargeable not to the negligence of defendant, but to that of the plaintiff. It follows that he is not entitled to recover in this action, and therefore the judgment of the Circuit court is reversed with a finding of fact.

REVERSED WITH FINDING
OF FACT.

(Over.)

173 - 24094 FINDING OF FACT.

The court finds as an ultimate fact that defendant was not guilty of any negligence charged against it in plaintiff's declaration, and further that plaintiff suffered the accident set out in his declaration as the result of his own negligent conduct.

173 - 24094 FINDING OF FACT.

The court finds as an ultimate fact that defendant was not guilty of any negligence charged against in plaintiff's declaration, and further that plaintiff suffered the accident set out in his declaration as the result of his own negligent conduct.

194 - 24116

212 I.A. 649

STACK ADVERTISING AGENCY,
Appellee,

vs.

JOHN CHURCH COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury plaintiff had judgment for $1179.22, and defendant appeals.

There are no errors in procedure which vitally affect defendant's rights.

The defendant made the following proposition to plaintiff in writing:

"November 2, 1915.

Stack Advertising Agency.
Chicago.

This is to advise you that the advertising campaign contemplated, incidental to the selling campaign being worked out in detail by Mr. Murray Springer, is to be handled by you. Such service to cover the preparation and placing newspaper and magazine advertising.

The campaign in prospect to start with the magazine issues of March, 1916, and to be, for the first year, on a basis of approximately $10,725.00. The newspaper advertising to be approximately $3,000.00. All copy to be submitted to me for final approval.

The charge for the advertising and your service to be covered by the advertising card rates of such media as may be determined upon; you to allow us the cash discounts allowed by the publications; we, in turn, to pay your bills on the discount dates specified.

This arrangement to be terminated by either you or ourselves at any time.

THE JOHN CHURCH CO.
By Frank A. Lee,
Prest."

December 6, 1915, defendant, by letter, enclosed a writing which it stated was "a schedule and cost, individual and total, on the magazine campaign proposed." A letter of December 10, 1915, from plaintiff to defendant in effect accepted the proposition thus tendered. The schedule referred to embraced advertising in the Cosmopolitan,

212 I.A. 649

No. 22115

STACK ADVERTISING AGENCY,
Appellee,

vs.

JOHN CHURCH COMPANY,
Appellant.

Appeal from Superior Court of Cook County.

MR. JUSTICE MCSZYSZ DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury plaintiff had judgment for $1178.24, and defendant appeals.

There are no errors in pleadings which affect defendant's rights.

The defendant made the following proposition to plaintiff in writing:

"December 6, 1919.

Stack Advertising Agency,
Chicago.

This is to advise you that the advertising campaign contemplated, including the selling campaign being worked out in detail by Mr. Murphy [illegible], is to be handled by you. Such service to cover the advertising and placing newspaper and magazine advertising.

The campaign is planned to start [illegible] magazine issues of March, 1920, and to run [illegible] year, on a basis of approximately [illegible] paper advertising to be approximately [illegible] copy to be submitted to me for final approval.

The charge for the advertising [illegible] service to be covered by the advertising [illegible] such media as may be agreed upon, [illegible] cash discounts allowed by the publications [illegible] to pay your bills on the discount basis [illegible].

This arrangement is [illegible] either you or otherwise as [illegible]

[illegible]

December 6, 1919, [illegible]

closed a writing which it stated [illegible] individual and total, [illegible]

A letter of December 1, 1919, [illegible] in effect accepted the proposition [illegible] schedule referred to embraced advertising in the [illegible]

Everybody's, World's Work, and Review of Reviews, for the months of March, April, May, October, November and December, 1916, at the aggregate cost of $10,725. Subsequently the Atlantic Monthly magazine was added by defendant.

February 11, 1916, defendant wrote plaintiff: "Owing to circumstances beyond our control, we are obliged to ask you to cancel our contract." The letter continues: "At our expense, if necessary, cancel copy you may have forwarded for publication in magazines not yet printed. We expect to pay you for every issue printed or on the press. No one more than we could regret inability to carry out the plan we had in mind, but this action absolutely imperative." Plaintiff, in pursuance of this letter, proceeded to minimize the cost to defendant of advertisements already placed in the magazines mentioned by cancelling the advertisements not published under arrangement with the magazine proprietors.

At the time the contract was cancelled plaintiff had, in pursuance of its terms, placed advertisements and earned compensation at the rate fixed by the contract of the parties amounting to $1179.22, the amount of the judgment appealed from. It is the contention of plaintiff that it is entitled to recover for all the work done by it under the contract at the rate specified in the contract, notwithstanding its subsequent cancellation; on the other hand, defendant contends that plaintiff is entitled to recover only compensation due it for advertising actually published in the magazines at the time the contract was cancelled.

We do not think the contract is susceptible of the construction which would support defendant's contention. The privilege to cancel was mutual. Either party could at its election do so at any time.

Everybody's, World's Work, and Review of Reviews, for the months of March, April, May, October, November and December, 1916, at the aggregate cost of $16,725. Subsequently the Atlantic Monthly magazine was added by defendant.

February 11, 1916, defendant wrote plaintiff: "Owing to circumstances beyond our control, we are obliged to ask you to cancel our contract." The letter continues: "At our expense, if necessary, cancel copy you may have forwarded for publication in magazines not yet printed. We expect to pay you for every issue printed or on the press. No one more than we could regret inability to carry out the plan we had in mind, but this notice absolutely imperative." Plaintiff, in pursuance of this letter, proceeded to minimize the cost to defendant of advertisements already placed in the magazines mentioned by cancelling the advertisements not published under arrangement with the magazine proprietors.

At the time the contract was cancelled plaintiff had, in pursuance of its terms, placed advertisements and earned compensation at the rate fixed by the contract of the parties amounting to $1175.24, the amount of the judgment appealed from. It is the contention of plaintiff that it is entitled to recover for all the work done or to be done under the contract at the rate specified in the contract, notwithstanding its subsequent cancellation; on the other hand, defendant contends that plaintiff is entitled to recover only compensation due it for advertising actually published in the magazines at the time the contract was cancelled.

We do not think the contract is susceptible of the construction which would support defendant's contention. The privilege to cancel was mutual. Either party could at its election do so at any time.

We think the rights of the parties must be measured as of the date of the cancellation. Whatever services plaintiff had rendered under the contract at the time of its cancellation, in pursuance of its terms, it was entitled to recover from defendant. Plaintiff procured the several magazines to cancel the orders for advertisements which plaintiff had caused to be placed in the several magazines for defendant to be published subsequent to the cancellation of the contract. In other words, plaintiff procured the magazines to release the contracts made by plaintiff for defendant under the terms of the contract between them after its cancellation.

We think it is too clear for dispute that plaintiff had earned all the compensation payable to it in virtue of the contract before its cancellation. For such services it was entitled to be paid, notwithstanding the cancellation of the contract. The cancellation of the contract did not affect the rights of either party to it existing at the time of cancellation for work and services rendered in pursuance of it to the time of its cancellation. There is no provision in the contract, either express or by construction, which indicates that plaintiff was to forego payment for services rendered in placing advertisements with the magazines mentioned in pursuance of the contract whenever defendant might exercise the right to cancel it. Nor is it denied that to fulfill the contract plaintiff must place advertisements with the magazines some time prior to their publication in order to procure therein the space needed therefor.

It appears to us that as plaintiff had performed all the services required by the contract before its cancellation, it was entitled to recover in this action the compensation agreed upon, and as the compensation awarded by the trial court

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We think it is too clear for dispute that plaintiff had earned all the compensation payable to it in virtue of the contract before its cancellation. For such services it was entitled to be paid, notwithstanding the cancellation of the contract. The cancellation of the contract did not affect the rights of either party to it existing at the time of cancellation for work and services rendered in pursuance of it to the time of the cancellation. There is no provision in the contract, either express or by construction, which indicates that plaintiff was to forego payment for services rendered in placing advertisements with the magazines mentioned in pursuance of the contract on account defendant might exercise the right to cancel it, nor is it denied that to fulfill the contract plaintiff must place advertisements with the magazines some time prior to this position. tion in order to procure thereby the same credit therefor.

It appears to us that as plaintiff had performed all the services required by the contract before its cancellation, it was entitled to recover in this action the compensation agreed upon, and as the compensation awarded by the trial court

is in harmony with the terms of the contract, we see no reason to depart from the conclusions at which the trial Judge arrived, and the judgment of the Municipal court is therefore affirmed.

AFFIRMED.

is in harmony with the terms of the contract, we see no reason to depart from the conclusions as which the trial judge arrived, and the judgment of the municipal court is therefore affirmed.

AFFIRMED.

203 - 24125

CONTINENTAL OIL PRODUCTS COMPANY, a corporation,
Appellant,

vs.

UNION PETROLEUM COMPANY, a corporation,
Appellee.

212 I.A. 649

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of nil capiat and for costs entered upon the finding of the trial Judge to whom the cause was submitted by the agreement of the parties.

The subject-matter of the controversy is a contract between the parties whereby defendant agreed to sell to plaintiff during the year 1914, at certain prices, seventy-five gallons of many different kinds of lubricating oils, delivery to be made in certain specified quantities. The suit is for damages for an alleged breach by defendant of the contract. In the first month of the contract there was delivery of certain oils by defendant to plaintiff on its order. Defendant contends that the contract was cancelled by the agreement of the parties. It is admitted that there was talk about a cancellation of the contract between the parties to it after some disagreements or complaints. The plaintiff contends that the understanding was that orders and deliveries should be suspended until defendant moved its business into new quarters, which it expected to do within three months of December, 1914. Defendant at the time of the talk did contemplate changing its quarters and did in fact do so in April, 1916. This change was not made within the life of the contract. Each party produced two witnesses to sustain its divergent con-

203 - 24125

CONTINENTAL OIL PRODUCTS COMPANY, a corporation, Appellant,	
vs.	
UNION PETROLEUM COMPANY, a corporation, Appellee.	

21214. 649

IN THE FIRST DISTRICT COURT OF APPEAL

OF CALIFORNIA.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of nil capiat and for costs entered upon the finding of the trial judge to whom the cause was duly tried by the stipulation of the parties.

The subject-matter of the controversy is a contract between the parties whereby defendant agreed to sell to plaintiff during the year 1914, at certain prices, respective gallons of many different kinds of lubricating oils, delivery to be made in certain specified quantities. The suit is for damages for an alleged breach by defendant of the contract. In the first month of the contract there was delivery of certain oils by defendant to plaintiff on its order. Defendant contends that the contract was cancelled by the agreement of the parties. It is admitted that there was talk about a cancellation of the contract between the parties but it after some [illegible] of complaints. The plaintiff contends that the understanding was that orders and deliveries might be suspended until defendant moved its business into new quarters, which it expected to do within three months. In December, 1914, Defendant at the time of the talk [illegible] its quarters and did in fact [illegible]. The change was not made within the life of the contract. Each party produced two witnesses to sustain its diversent con-

tentions. If it is admitted that each of these witnesses were of equal credit, then plaintiff has failed to make out its case as the law requires by a preponderance of the evidence on this crucial point. If the contract was cancelled, there is an end to plaintiff's case.

We think that, aside from the testimony of defendant's two witnesses, there were circumstances in the case which give credence to the contention of defendant that the contract was cancelled. The facts conceded by plaintiff that there was a talk of suspending deliveries until after defendant moved its place of business, that such removal did not take place until after the contract had expired by limitation, and that plaintiff ceased ordering oil, in the meantime buying its oil elsewhere, and did not again present any order for a long time after the claimed cancellation of the contract, and then at a time when according to plaintiff's claim the price of lubricating oils had been increased, may have led the trial Judge to the conclusion that the greater weight of the evidence sustained defendant's contention that the contract was cancelled.

The trial Judge saw the witnesses - a privilege denied this court - and therefore was the better able to determine from their manner and appearance where to give and where to deny credit, and we are unable to say from the record that the finding of the trial Judge was contrary to the weight of the evidence, and consequently under elementary legal principles we are not permitted to disturb such finding.

We are of the opinion that from all the evidence in the record the court might reasonably find that

tentions. If it is admitted that each of these witnesses were of equal credit, then plaintiff has failed to make out its case as the law requires by a preponderance of the evidence on this crucial point. If the contract was cancelled, there is an end to plaintiff's case.

We think that, aside from the testimony of defendant's two witnesses, there were circumstances in the case which give credence to the contention of defendant that the contract was cancelled. The facts conceded by plaintiff that there was a talk of suspending daily-orders until after defendant moved its place of business, that such removal did not take place until after the contract had expired by limitation, and that plaintiff ceased ordering oil, in the meantime buying its oil elsewhere, and did not again present any order for a long time after the claimed cancellation of the contract, and then at a time when according to plaintiff's claim the price of lubricating oils had been increased, may have led the trial judge to the conclusion that the greater weight of the evidence sustained defendant's contention that the contract was cancelled.

The trial judge saw the witnesses - a privilege denied this court - and therefore was the better able to determine from their manner and appearance where to give and where to deny credit, and we are unable to say from the record that the finding of the trial judge was contrary to the weight of the evidence, and consequently under elementary legal principles we are not remitted to disturb such finding.

We are of the opinion that from all the evidence in the record the court might reasonably find that

the contract sued upon was cancelled. Such being the fact, the remaining questions raised and discussed are of no importance.

For these reasons the judgment of the Municipal court must be and it is affirmed.

AFFIRMED.

the contract sued upon was cancelled. Such being the fact, the remaining questions raised and discussed are of no importance.

For these reasons the judgment of the municipal court must be and it is affirmed.

AFFIRMED.

329 - 24256

WESTERN EXPRESS COMPANY,
a corporation,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

212 I.A. 649

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The plaintiff brought this suit against the City of Chicago to recover $40 paid by it under duress, as it claims, to the City for forty licenses at $1 each for forty wagons owned by plaintiff and operated within the city. It is claimed that the ordinance under which the money was paid was beyond the powers of the City Council to pass. The ordinance is also said to be violative of the federal principle of interstate commerce, and that the ordinance is unconstitutional and void.

From a judgment against it for the amount claimed the City appeals. The trial was before the court by agreement of the parties. The judgment must be reversed and a new trial awarded because there is no evidence in the record sufficient in law to support the judgment.

We may here parenthetically remark, for the future guidance of counsel, that if the ordinance in question is unconstitutional, then this is not the court which can so determine. We have no jurisdiction to decide constitutional questions thus raised.

It is said that the ordinance involved is Secs. 2616 to 2634 of the Municipal Code; but these sections are not, nor is either of them, legally in the record, and if we have power to pass upon them, we are unable to do so because they are not before us.

329 - 24256

WESTERN EXPRESS COMPANY,
a corporation,
Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM LEGAL COURT
OF CHICAGO.

212 I.A. 649

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT:

The plaintiff brought this suit against the City of Chicago to recover $40 paid by it under duress, as it claims, to the City for forty licenses at $1 each for forty wagons owned by plaintiff and operated within the city. It is claimed that the ordinance under which the money was paid was beyond the powers of the City Council to pass. The ordinance is also said to be violative of the federal principle of interstate commerce, and that the ordinance is unconstitutional and void.

From a judgment against it for the amount claimed the City appeals. The trial was before the court by agreement of the parties. The judgment must be reversed and a new trial awarded because there is no evidence in the record sufficient in law to support the judgment.

We may here parenthetically remark, for the future guidance of counsel, that if the ordinance in question is unconstitutional, then this is not the court which can so determine. We have no jurisdiction to decide constitutional questions thus raised.

It is said that the ordinance involved is Secs. 2616 to 2634 of the Municipal Code; but these sections are not, nor is either of them, legally in the record, and if we have power to pass upon them, we are unable to do so because they are not before us.

There is nothing in the record to show that the ordinance was read to the trial Judge, and aside from a passing reference thereto in argument, the ordinance was not mentioned.

While the ordinance is copied into the record, it is merely certified to be an ordinance of the City without in any manner showing how it is pertinent to or connected with this case, as it follows the recitation, "Which was all the evidence introduced and proceedings had at the hearing of the above entitled cause."

While the Municipal court may take judicial notice of the ordinances of the City, we may not. We cannot pass upon a city ordinance unless it is certified to us that the trial court took judicial notice of it upon the trial or that the same was introduced in evidence.

There is another incongruity in this record, which consists in a seeming attempt to certify the appeal to the Supreme court, but it is not in form. It follows the stenographic report, whereas, to be effective, it should be contained in the statutory record. It is incomplete in another respect - it is without date. If the appeal is in fact certified to the Supreme court, it has no place in this court.

The only witness examined was the agent of plaintiff in Chicago and his was the only evidence heard upon the trial. This witness testified to no fact material to the issue joined. After testifying that defendant was engaged in the transportation express business, principally between the cities of St. Louis, Minneapolis, western points and some eastern points, and that it shipped goods on western railways and had connections with every State, the witness stated that "the company does not transport wares and mer-

There is nothing in the record to show that the ordinance was read to the trial Judge, and aside from a passing reference thereto in argument, the ordinance was not mentioned.

While the ordinance is copied into the record, it is merely certified to be an ordinance of the city without in any manner showing how it is pertinent to or connected with this case, as it follows: "Upon consideration, "Upon all the evidence introduced and proceedings had at the hearing of the above entitled cause."

While the Municipal court may take judicial notice of the ordinances of the city, we may not. We cannot pass upon a city ordinance unless it is certified to be that the trial court took judicial notice of it upon the trial or that the same was introduced in evidence.

There is another incongruity in this record, which consists in a seeming attempt to certify the appeal to the supreme court, but it is not in form. It follows the stenographic report, whereas, to be effective, it should be contained in the statutory record. It is incomplete in another respect - it is without date. If the appeal is in fact certified to the supreme court, it has no place in this court.

The only witness examined was the agent of plaintiff in Chicago and his was the only evidence heard upon the trial. This witness testified to a fact material to the issue joined. After testifying that defendant was engaged in the transportation express business, principally between the cities of St. Louis, Minneapolis, western points and some eastern points, and that it shipped goods on western railways and had connections with every state, the witness stated that "the company does not transport water and wer-

chandise within the City of Chicago. We take care of no packages in Chicago." These were negative statements and not proof of any affirmative fact.

This witness further testified that one of defendant's employees was arrested and told by the magistrate before whom the man was taken that unless defendant complied with the ordinance and took out forty one dollar licenses, defendant would be prosecuted the following morning as a violator of the ordinance. Under stress of this threat the money sued for was paid. The trial Judge thereupon announced that as to defendant the ordinance was void. Thereupon counsel for the City attempted to cross examine the witness, but was brusquely prevented from so doing by the court, who declared he needed no more evidence.

This is, to say the least, a new and somewhat novel method of judicial procedure. If the ordinance was to be considered intthe case, it was pertinent to inquire whether defendant had forty wagons which it operated within the limits of Chicago. If it did, then it would have been proper to have tendered proof of the manner of their operation and what the wagons transported. The court had no right to assume from the lack of proof that the wagons of defendant operated by it in Chicago were engaged in interstate or any other kind of commerce. Courts can only apply the law to facts, which facts must be established by competent proof. The trial Judge had no right to prevent defendant's counsel from cross-examining plaintiff's witness.

There must be a trial in accord with well established rules of law and evidence, and for that purpose the judgment of the Municipal court is reversed and a new trial awarded.

REVERSED AND REMANDED.

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peddlers in Chicago." These were suggestive statements and
not proof of any affirmative fact.

This witness further testifies that one of
defendant's employees was arrested and told by the magis-
trate before whom the man was taken that unless defendant
complied with the ordinance and took out forty one dollar
licenses, defendant would be prosecuted the following
morning as a violator of the ordinance. Under threats of
this threat the money sued for was paid. The trial judge
thereupon announced that as to defendant the ordinance was
void. Thereupon counsel for the city attempted to cross
examine the witness, but was promptly prevented from so
doing by the court, who declared he needed no more evidence.

This is, to say the least, a new and novel method of judicial procedure. If the ordinance was to be considered in the case, it was pertinent to inquire whether defendant had forty wagons which it operated within the limits of Chicago. If it did, then it would have been proper to have introduced proof of the number of their operation and what the wagons transported. The court had no right to assume from the lack of proof that the wagons of defendant operated by it in Chicago were engaged in interstate or any other kind of commerce. Courts can only apply the law to facts, which facts must be established by competent proof. The trial judge had no right to prevent defendant's counsel from cross-examining plaintiff's witness.

There must be a trial in accord with well established rules of law and evidence, and for that purpose the judgment of the municipal court is reversed and a new trial awarded.

REVERSED AND REMANDED.

343 - 24270

THE NATIONAL BANK OF THE REPUBLIC OF CHICAGO, a corporation,
Appellee,
vs.
JOHN T. JANETTE and MARIE JANETTE,
Appellants.

212 I.A. 650

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The Supreme court and this court have repeatedly held that the abstract is the pleading of the parties and that the court will not reverse a judgment where no reason therefor appears from such abstract. Nor will the court look to the record for reasons to reverse and will only reverse where errors appear from an inspection of the abstract.

Furthermore, these courts have frequently held that the judgment appealed from must appear from the abstract to be in the record and that a judgment which does not so appear, but is to be found only in the bill of exceptions, is not preserved for review.

The abstract of the record in this case is merely an index and contains no information regarding either the date or the amount of the judgment appealed from. The abstract merely shows "verdict of jury," "judgment and appeal granted." While it is true the date and amount of the verdict and judgment thereon do appear in the bill of exceptions as abstracted, this is fruitless to preserve the judgment for review. People v. Shapiro, 203 Ill. App. 292; Bishop v. Loewus, 63 ibid 351; Deane v. Michigan Stove Co., 69 ibid 106; McGovern v. City of Chicago, 202 ibid 139.

For the foregoing reasons the judgment of the Municipal court is affirmed.

AFFIRMED.

212 I.A. 650

THE NATIONAL BANK OF THE REPUBLIC OF CHICAGO, a corporation,

Appellee,

vs.

JOHN T. JANETT and MARY JANETT,

Appellants.

MR. JUSTICE [illegible] delivered the opinion of the court:

The Supreme Court and this court have uniformly held that the abstract in the pleading of the writing on which the court will not reverse a judgment on the ground therefor appears from such abstract. Nor will the court look to the record for reasons to reverse and will only reverse where errors appear from an inspection of the abstract.

Further more, [illegible] are frequently held that the judgment appealed from [illegible] from the abstract to be in the record [illegible] judgment [illegible] proper, but is to be found only in the bill of exceptions. It not preserved for review.

The abstract of the record [illegible] is merely an index and contains no [illegible] date or the amount of the judgment [illegible] merely shows "verdict" [illegible] "judgment [illegible] ed." While it is true the [illegible] of [illegible] judgment therein do appear in the bill of exceptions [illegible] abstract, this is insufficient to preserve the [illegible] for review. Jones v. Sheafe, 205 Ill. App. 481; Lange v. Lange, 88 Ill. App. 1; Deane v. Michigan Cent. Co., 2 Ill. App. 158; Lowrey v. Mfg. Co. of Chicago, 2 Ill. App. 159.

For the foregoing reasons the judgment of the municipal court is affirmed.

AFFIRMED.

137 - 24056

BERTHA HAEHNLEIN,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,
Defendant in Error.

212 I.A. 650

ERROR TO CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff claims to have been injured by the negligence of the defendant while she was a passenger alighting from one of its street cars. She brought suit to recover damages, but upon trial the jury returned a verdict finding the defendant not guilty, upon which judgment was entered which she asks this court to reverse.

Is the verdict contrary to the weight of the evidence? It is not controverted that plaintiff was a passenger on a westbound Chicago avenue car which stopped at 48th avenue for a return trip. It was an old style open summer car, 32 feet in length, with 12 seats, 6 on each side of an aisle. On the outer side of this car was a step extending the entire length, about 16 inches below the floor. When the car was traveling westward the north step would be lowered to enable passengers to enter and alight; when the car went eastward the north step would be raised and the south step lowered. There were also movable guard rails to prevent passengers from using the wrong side of the car. They were of white pine, 21 feet 9 inches long, 1 1/2 inches wide and an inch thick. When the car went west the rails on the north side were raised to the roof and held there in place, and when so raised were 5 feet 8 inches above the car floor. When it was desired to close one side of the car to prevent passengers getting on or off that side, the guard rail was lowered between the grab-iron

137 - 24056

BERTHA HAENNLEIN,
Plaintiff in Error,

vs.

CHICAGO RAILWAYS COMPANY,
Defendant in Error.

ERROR TO CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MOSRNEY DELIVERED THE OPINION OF THE COURT.

Plaintiff claims to have been injured by the negligence of the defendant while she was a passenger alighting from one of its street cars. She brought suit to recover damages, but upon trial the jury returned a verdict finding the defendant not guilty, upon which judgment was entered which she asks this court to reverse.

Is the verdict contrary to the weight of the evidence? It is not controverted that plaintiff was a passenger on a westbound Chicago avenue car which stopped at 48th avenue for a return trip. It was an old style open summer car, 32 feet in length, with in seats, 2 on each side of an aisle. On the outer side of this car was a step extending the entire length, about 16 inches below the floor. When the car was traveling westward the north step would be lowered to enable passengers to enter and alight; when the car went eastward the no th step would be raised and the south step lowered. There were also movable guard rails to prevent passengers from going the wrong side of the car. They were of white pine, 21 feet 9 inches long, 1 1/2 inches wide and an inch thick. When the car went west the rails on the north side were raised to a vertical and held there in place, and when so raised were 3 feet 6 inches above the car floor. When it was desired to close one side of the car to prevent passengers getting on or off that side, the guard rail was lowered between the stanchions

and the stanchions, and when lowered it was 21 inches above the car floor.

The alleged accident occurred when the car was at its terminus at 48th avenue and during the process of preparing the car for its return trip eastward. Plaintiff alleged in her declaration and sought to prove that the defendant, by its conductor, negligently dropped this rail upon her as she was alighting, striking her upon the head and inflicting the injuries claimed. Her testimony was in substance that when the car reached 48th avenue she started to get off; that no other persons were then on the car; that she walked from the south to the north side of the car, and at this time the guard rail was up; that when her right foot was on the step the guard rail came down, hitting her on the head, which dazed her; that she sat down hard in the seat and remained there two or three minutes; and that no one went near her; that she inquired of the conductor if he did not see her and he replied that he thought she had alighted. The only other witness testifying as to the occurrence was the conductor, who testified that when the car stopped there were five or six passengers, all of whom alighted except plaintiff, who was sitting about the third seat from the front, facing forward; that in preparing the car for its return trip east it was his duty to change the trolley, raise the step on the north side and lower the guard rail on that side; that when plaintiff was on the step she turned around and reached into the car just as he was letting the guard rail down, and that her head bumped against it; that he did not let the rail out of his hand; that he then went to plaintiff and asked if her hat was torn, to which she replied in the negative; that he asked her for

and the stanchions, and when lowered it was 21 inches above the car floor.

The alleged accident occurred when the car was at its terminus at 48th avenue and during the process of preparing the car for its return trip eastward. Plaintiff alleged in her declaration and sought to prove that the defendant, by its conductor, negligently dropped this rail upon her as she was alighting, striking her upon the head and inflicting the injuries claimed. Her testimony was in substance that when the car reached 48th avenue she started to get off; that no other persons were then on the car; that she walked from the south to the north side of the car, and at this time the guard rail was up; that when her right foot was on the step the guard rail came down, hitting her on the head, which dazed her; that she sat down hard in the seat and remained there two or three minutes; and that no one went near her; that she inquired of the conductor if he did not see her and he replied that he thought she had alighted. The only other witness testifying as to the occurrence was the conductor, who testified that when the car stopped there were five or six passengers, all of whom alighted except plaintiff, who was sitting about the third seat from the front, facing forward; that in preparing the car for its return trip east it was his duty to change the trolley, raise the step on the north side and lower the guard rail on that side; that when plaintiff was on the step she turned around and reached into the car just as he was letting the guard rail down, and that her head bumped against it; that he did not let the rail out of his hand; that he then went to plaintiff and asked her if she was hurt, to which she replied in the negative; that he asked her for

her name, and that she stated there was no damage done and refused to give him her name. The motorman did not see the accident, but testified that after the car stopped and he had finished adjusting it for the return trip, he walked to the rear end and saw the conductor and plaintiff standing in the street three or four steps from the front end of the car, and heard the conductor ask her for her name but that she did not give it to him, and that he heard her say, "no harm done, never mind."

The stories of plaintiff and the conductor are in conflict. Plaintiff's story is uncorroborated, and there are many circumstances which are elaborately discussed in detail in the briefs which tend to discredit the correctness of her testimony. In view of these circumstances and the direct contradiction by the conductor of plaintiff's description of the occurrence, we cannot say that the jury could not properly find that plaintiff had failed to prove that the accident happened through the negligence of the defendant as alleged in her declaration. Among the cases holding that an affirmative statement met with a categorical denial by a credible witness does not constitute that quantum of affirmative proof required to sustain a judgment, are Siegmund v. Strackbein, 140 Ill. App. 454; Brady v. Chaffee, 163 id. 242; Trybula v. Plamondon Mfg. Co., 153 id. 298; Davenport v. Calumet & S. C. Ry. Co., 197 id. 372.

Complaint is made of the rulings of the court upon the admission and rejection of evidence, but we are of the opinion that no reversible error was committed in this regard. Most of the rulings cited were proper, as the questions and answers contained conclusions which were properly stricken out.

her name, and that she stated there was no damage done and refused to give him her name. The motorman did not see the accident, but testified that after the car stopped and he had finished adjusting it for the return trip, he walked to the rear and saw the conductor and plaintiff standing in the street three or four steps from the front end of the car, and heard the conductor ask her for her name but that she did not give it to him, and that he heard her say, "no harm done, never mind."

The stories of plaintiff and the conductor are in conflict. Plaintiff's story is uncorroborated, and there are many circumstances which are elaborately discussed in detail in the briefs which tend to discredit the correctness of her testimony. In view of these circumstances and the direct contradiction by the conductor of plaintiff's description of the occurrence, we cannot say that the jury could not properly find that plaintiff had failed to prove that the accident happened through the negligence of the defendant as alleged in her declaration. Among the cases holding that an affirmative statement met with a categorical denial by a credible witness does not constitute that quantum of affirmative proof required to sustain a judgment, are Blemmund v. Strackbein, 142 Ill. App. 454; Kirby v. Office, 163 id. 242; Trybula v. Illinois Cig. Co., 158 id. 298; Davenport v. Calumet & S. C. Ry. Co., 97 id. 476.

Complaint is made of the rulings of the court upon the admission and rejection of evidence, but we are of the opinion that no reversible error was committed in this regard. Most of the rulings cited were proper, as the questions and answers contained conclusions which were properly stricken out.

Errors, if any, with reference to the medical testimony are unimportant in view of the propriety of the jury's conclusion that plaintiff had not proven that she was injured through the negligence of the defendant alleged in her declaration.

Criticism is made of instruction No. 2 given at the request of defendant, on the ground that it was calculated to mislead the jury. The instruction contains a correct statement of law, but possibly may not have been wholly applicable. However this may be, we do not see how it could possibly have misled the jury. Refused instruction No. 4 requested by plaintiff might properly have been given, although its essence is contained in plaintiff's instruction No. 2. Also other instructions requested by plaintiff and refused might properly have been given, but we do not see how it could reasonably be claimed that either giving or refusing them could have affected the jury in any way. For the most part they correctly state the law, but would have added nothing material or essential to the instructions which the jury received as to the law of the case. In view of the failure of sufficient evidence to support plaintiff's declaration it can not be said that either the giving or refusing of the instructions mentioned is serious.

We see no reason to disagree with the verdict of the jury, and as there were no reversible errors upon the trial the judgment is affirmed.

AFFIRMED.

Errors, if any, with reference to the medical testimony are unimportant in view of the propriety of the jury's conclusion that plaintiff had not proven that she was injured through the negligence of the defendant alleged in her declaration.

Criticism is made of instruction No. 2 given at the request of defendant, on the ground that it was calculated to mislead the jury. The instruction contains a correct statement of law, but possibly may not have been wholly applicable. However this may be, we do not see how it could possibly have misled the jury. Refused instruction No. 4 requested by plaintiff might properly have been given, although its essence is contained in plaintiff's instruction No. 2. Also other instructions requested by plaintiff and refused might properly have been given, but we do not see how it could reasonably be claimed that either giving or refusing them could have affected the jury in any way. For the most part they correctly state the law, but could have added nothing material or essential to the instructions which the jury received as to the law of the case. In view of the failure of sufficient evidence to support plaintiff's declaration it can not be said that either the giving or refusing of the instructions mentioned is serious.

We see no reason to claim see with the verdict of the jury, and as there were no reversible errors in the trial the judgment is affirmed.

AFFIRMED.

157 - 24077

212 I.A. 650

RALPH C. HAUF and CARRIE HAUF, Appellants, vs. HAROLD N. BUCKLEY, Appellee.	Appeal from County Court, Cook County.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover rental under a written lease to defendant, and for damages to the premises alleged to have occurred because of the abandonment by the defendant and which under the terms of the lease he was obliged to make good. Upon trial verdict was returned against plaintiffs' claim and judgment thereon was entered from which plaintiffs have appealed.

As there must be another trial we shall not narrate the evidence at any length. It appears that in January, 1916, a five days' notice in the usual statutory form was served upon the defendant. In this the defendant was requested to pay the rent then due, with notice that if it was not paid by January 23rd "your lease of said premises will be terminated." This rent was paid on January 25th, and a short time thereafter the defendant removed from the premises upon the assumption that the serving of this notice operated as a termination of the lease. Upon the trial the court was asked to instruct the jury that the service of this five days' notice did not of itself amount to a termination of the lease, and that if the tenant vacated the premises without

157 - 24077

212 I.A. 650

RALPH C. HAUF and CARRIE HAUF, Appellants,	Appeal from
vs.	County Court,
HAROLD H. BUCKLEY, Appellee.	Cook County.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit to recover rental under a written lease to defendant, and for damages to the premises alleged to have occurred because of the abandonment by the defendant and which under the terms of the lease he was obliged to make good. Upon trial verdict was returned against plaintiffs' claim and judgment thereon was entered from which plaintiffs have appealed.

As there must be another trial we shall not narrate the evidence at any length. It appears that in January, 1916, a five days' notice in the usual statutory form was served upon the defendant. In this the defendant was requested to pay the rent then due, with notice that if it was not paid by January 23rd "your lease of said premises will be terminated." This rent was paid on January 25th, and a short time thereafter the defendant removed from the premises upon the assumption that the serving of this notice operated as a termination of the lease. Upon the trial the court was asked to instruct the jury that the service of this five days' notice did not of itself amount to a termination of the lease, and that if the tenant vacated the premises without

any further action on the part of the landlord it amounted to an abandonment, but such instruction was refused. We are of the opinion that this correctly stated the law and should have been given. We are aware of what has been said in other cases concerning the effect of a five days' notice, but are inclined to follow the reasoning and conclusion of the court as stated in Jefferys v. Hart, 197 Ill. App. 514, and Dickenson v. Petrie, 38 Ill. App. 155; in these cases it is held that "until an act is performed by the landlord in pursuance to said notice, which could be regarded as an election to consider the tenancy ended, the tenant has no right to vacate the premises." Jefferys case, supra, p. 519. Applying this rule, if the evidence shows that without any further affirmative act on the part of the landlord indicating an intention to terminate the lease, defendant vacated the premises this must be considered an abandonment.

The damage was caused by freezing of the water pipes after defendant had vacated. There was evidence that on the day defendant was moving, some person, whose identity is not shown, did something in connection with the pipes, and it is argued that this act amounted to an acceptance by the landlord of the premises and assent to the termination of the lease. This contention is unsound: (1) the connection of this workman with the landlord is not shown, and (2) the landlord would have the right to protect his property as far as possible after an abandonment.

In addition to the legal effect of the five days' notice as claimed by the defendant, it was asserted as an

any further action on the part of the landlord it amounted to an abandonment, but such instruction was refused. We are of the opinion that this correctly stated the law and should have been given. We are aware of what has been said in other cases concerning the effect of a five days' notice, but are inclined to follow the reasoning and conclusion of the court as stated in Lefkowitz v. Hart, 187 Ill. App. 614, and Dickerson v. Petrie, 58 Ill. App. 1[illegible]; in these cases it is held that "until an act is performed by the landlord in pursuance to said notice, which could be regarded as an election to consider the tenancy ended, the tenant has no right to vacate the premises." Lefkowitz case, supra, p. 618. Applying this rule, if the evidence shows that without any further affirmative act on the part of the landlord indicating an intention to terminate the lease, defendant vacated the premises this must be considered an abandonment.

The damage was caused by freezing of the water pipes after defendant had vacated. There was evidence that on the day defendant was moving, some person, whose identity is not shown, did something in connection with the pipes, and it is argued that this act amounted to an acceptance by the landlord of the premises and assent to the termination of the lease. This contention is unsound: (1) the connection of this workman with the landlord is not shown, and (2) the landlord could have the right to protect his property as far as possible after abandonment.

In addition to the legal effect of the five days' notice as claimed by the defendant, it was asserted as an

excuse for vacating that the premises were not in good repair as covenanted by plaintiffs. There is no evidence of any failure on the part of the lessors to perform any of the agreements mentioned in the lease with reference to repairs.

A large amount of testimony was permitted concerning the heating of the premises during the winter, which was subsequently stricken out by the court. It was error in the first place to have permitted such testimony, as it was not relevant or material to the issues; furthermore it is not claimed that inadequacy of the heating plant amounted to a constructive eviction.

The criticism against defendant's instruction No. 1, which calls particular attention to one witness, is well made; such instructions have been repeatedly condemned. People v. Campbell, 234 Ill. 391.

Upon a second trial the defense should be limited to the grounds stated in the affidavit of merits, and the trial should proceed under the rule above announced as to the effect of the five days' notice.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

excuse for vacating that the premises were not in good repair as covenanted by plaintiffs. There is no evidence of any failure on the part of the lessors to perform any of the agreements mentioned in the lease with reference to repairs.

A large amount of testimony was permitted concerning the heating of the premises during the winter, which was subsequently stricken out by the court. It was error in the first place to have permitted such testimony, as it was not relevant or material to the issues; furthermore it is not claimed that inadequacy of the heating plant amounted to a constructive eviction.

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Upon a second trial the evidence should be limited to the grounds stated in the affidavit of merits, and the trial should proceed under the rule above announced as to the effect of the five days' notice.

The judgment is reversed and the cause remanded.

LOVINGTON AND [illegible], J.

176 - 24097

212 I.A. 650

J. RAYNER,
Appellee,

vs.

JOSEPH F. STURDY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon promissory notes executed by the defendant, on trial by the court had judgment for $281 which the defendant seeks to have reversed.

The evidence tends to show that the defendant, being financially embarrassed, on June 20, 1914, executed a composition agreement with Frank M. McKey, trustee, for the benefit of creditors, and at the same time delivered to the trustee all of his property. Other parties to the agreement, as therein stated, were "the several individuals, firms and corporations who may become parties to this instrument by assenting in writing to the terms hereof, either by affixing their signatures to this instrument or by assenting in writing hereto."

Plaintiff asserts that he was not a party to this agreement, hence not bound by it. We are of the opinion, however, that plaintiff did assent thereto, as shown by these facts: On June 23, 1914, the trustee notified the creditors of defendant of the execution of the composition agreement and the delivery of the property for the benefit of creditors. Plaintiff received such notice, and on June 27th filed his verified claim with the trustee, to which were attached copies of the notes on which he has brought suit. Subsequently four dividends were declared by the trustee for

176 - 24097

212 I.A. 650

J. RAYNER,
Appellee,

vs.

JOSEPH F. STURDY,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit upon promissory notes executed by the defendant, on trial by the court had judgment for $281 which the defendant seeks to have reversed.

The evidence tends to show that the defendant, being financially embarrassed, on June 2, 1914, executed a composition agreement with Frank E. Bailey, trustee, for the benefit of creditors, and at the same time delivered to the trustee all of his property. Other parties to the agreement, as therein stated, were "the several individuals, firms and corporations who may become parties to this instrument by assenting in writing to the terms hereof, either by affixing their signatures to this instrument or by assenting in writing hereto."

Plaintiff asserts that he was not a party to this agreement, hence not bound by it. We are of the opinion, however, that plaintiff did assent thereto, as shown by these facts: On June 25, 1914, the trustee notified the creditors of defendant of the execution of the composition agreement and the delivery of the property for the benefit of creditors. Plaintiff received such notice, and on June 27th filed his verified claim with the trustee, to which were attached copies of the notes on which he has brought suit. Subsequently four dividends were declared by the trustee for

various amounts; these were paid to the creditors by checks. The initial check received by plaintiff bore on its face the words, "First divid. 10 per cent.," was signed "Joseph F. Sturdy, F. M. McKey, Trustee"; it bore these words of endorsement: "Received this first dividend under the trust agreement for the benefit of creditors of Joseph F. Sturdy." This check was received by plaintiff, endorsed by him, deposited and paid. The checks for the other dividends received by plaintiff bore similar words indicating that they were dividends under the trust agreement, and all of them were endorsed by plaintiff and paid. It also appears in evidence that payments were made to all of the creditors under this arrangement, and that none of them signed the agreement of June 20th; that plaintiff had no knowledge of the actual language of the trust agreement or of its provisions touching the assent of creditors. Such conduct on the part of plaintiff must be held to be an assent to the composition arrangement. Among the cases so holding under similar circumstances are Chemical National Bank v. Kohner, 85 N. Y. 189; Mellen v. Goldsmith, 47 Wis. 573; Heinzer v. Klyberg, 149 N. Y. Supp. 949; Atlas Engine Works v. First National Bank, 50 Ind. App. 549; Mansfield v. Rutland Mfg. Co., 52 Vt. 444.

It has many times been held that while a composition agreement remains in force it will operate as a bar to any action to recover the original debt or claim of any creditor who has joined. See National Time Recorder Co. v. Feypel, 93 Ill. App. 170; Condict v. Flower, 106 Ill. 105; Globe Wernicke Co. v. Siegel Myers School of Music, No. 23873, App. Court First Dist. Ill., opinion filed March 5, 1918.

various amounts; these were paid to the creditors by checks. The initial check received by plaintiff bore on its face the words, "First divid. 10 per cent.," was signed "Joseph W. Sturdy, W. M. McKay, Trustee"; it bore these words of endorsement: "Received this first dividend under the trust agreement for the benefit of creditors of Joseph W. Sturdy." This check was received by plaintiff, endorsed by him, deposited and paid. The checks for the other dividends received by plaintiff bore similar words indicating that they were dividends under the trust agreement, and all of them were endorsed by plaintiff and paid. It also appears in evidence that payments were made to all of the creditors under this arrangement, and that none of them signed the agreement of June 20th; that plaintiff had no knowledge of the actual language of the trust agreement or of its provisions touching the assent of creditors. Such conduct on the part of plaintiff must be held to be an assent to the composition arrangement. Among the cases so holding under similar circumstances are Chemical National Bank v. Kohner, 85 N. Y. 189; Mellen v. Goldsmith, 47 Wis. 573; Hoinger v. Nybergh, 149 N. Y. Supp. 949; Atlas Engine Works v. First National Bank, 30 Ind. App. 349; Mansfield v. Rutland Ry. Co., 52 Vt. 444.

It has many times been held that while a composition agreement remains in force it will operate as a bar to any action to recover the original debt or claim of any creditor who has joined. See National Time Recorder Co. v. Peppel, 93 Ill. App. 170; Conklet v. Flower, 168 Ill. 105; Globe Wernicke Co. v. Illinois Wheel School of Law, No. 23873, App. Court First Dist. Ill., opinion filed March 5, 1918.

As to the necessity of propositions of law to be held by the trial court as a condition to review by the Appellate Court, whatever may be the rule in the Supreme Court such is not the rule in this court. Bradish v. Yocum, 130 Ill. 386; Siegmund v. Strackbein, 140 Ill. App. 454; City v. Bartels, 146 id. 180; Lanski v. C. & N. W. Ry. Co., 181 id. 565; Consolidated R. & C. Co. v. Crane Co., 183 id. 392.

For the reasons above indicated the judgment of the Municipal court is reversed and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

As to the necessity of propositions of law to be held by the trial court as a condition to review by the Appellate Court, whatever may be the rule in the Supreme Court such is not the rule in this court. Brandish v. Young, 130 Ill. 386; Aigeemond v. Strackbein, 140 Ill. App. 454; City v. Martola, 146 id. 180; Lanski v. C. & N. W. Ry. Co., 151 id. 369; Consolidated P. & C. Co. v. Crane Co., 153 id. 386.

For the reasons above indicated the judgment of the Municipal court is reversed and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT HERE.

227 - 24152

CLARENCE W. DUNOON and
BEULAH E. DUNOON,
Appellees,

vs.

CHARLES O. RACE and
ALLEN A. PARSONS,
Appellants.

212 I.A. 650

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

In an action of trover plaintiffs had judgment for $175 against the defendants, Charles O. Race and Allen A. Parsons, from which they appeal. The action is based upon the alleged wrongful conversion of household goods belonging to plaintiffs. Defendants assert that neither they nor either of them ever had actual or constructive possession of the goods. Plaintiffs do not appear in this court to defend the appeal.

Examination of the evidence leads us to the conclusion that the defense is justified by the facts and that no judgment should have been entered against these defendants. There is practically no controversy over the salient facts, which are that one Richard T. Race, who is not a party defendant, held two chattel mortgages upon the furniture in question to secure an indebtedness to him from the plaintiffs; that in pursuance of his rights under the mortgages he took possession of the goods and stored them in a warehouse in his own name. He afterwards had them removed to another place where he continued to have possession of the same, and they remained in the possession of Richard T. Race until his death, which was a few days before the suit was begun, and were still there at the time the case was tried. The only evidence connecting the

227 - 24152

CLARENCE W. DUNCOM and HELEN E. DUNCOM, Appellees, vs. CHARLES C. RACE and ALICE A. PARSONS, Appellants.	21214. 650 APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MORGANROY DELIVERED THE OPINION OF THE COURT.

In an action of trover plaintiffs had judgment for $175 against the defendants, Charles C. Race and Alice A. Parsons, from which they appeal. The action is based upon the alleged wrongful conversion of household goods belonging to plaintiffs. Defendants assert that neither they nor either of them ever had actual or constructive possession of the goods. Plaintiffs do not appear in this court to defend the appeal.

Examination of the evidence leads us to the conclusion that the defense is justified by the facts and that no judgment should have been entered against these defendants. There is practically no controversy over the material facts, which are that one Edward L. Race, who is not a party defendant, held two chattel mortgages on the furniture in question to secure an indebtedness to him from the plaintiffs; that in pursuance of his rights under the mortgages he took possession of the goods and stored them in a warehouse in the same house. He afterwards had them removed to another place where he continued to have possession of the same. The only evidence in the possession of Edward L. Race until the sale, which was a few days before the suit was begun, and were still there at the time the case was tried. The only evidence connecting the

defendants with the furniture consists in alleged admissions said to have been made by them, which were directly denied by the testimony of the defendants.

There is not sufficient evidence to support the charge of conversion, and the judgment cannot stand; it will be reversed and judgment of nil capiat will be entered in this court.

REVERSED AND JUDGMENT HERE.

efendants with the furniture consists in allegations that
uld to have been made by them, which were directly denied
y the testimony of the defendants.

There is not sufficient evidence to support
e charge of conversion, and the judgment cannot stand; it
ill be reversed and judgment of nil capiat will be en-
ered in this court.

REVERSED AND [illegible] TO NIL.

243 - 24168

SYBIL TUCKER, Administratrix of the Estate of HARRY G. TUCKER, deceased,
Appellee,

vs.

CARL MUELLER and HARRY B. McNEAL,
Appellants.

212 I.A. 651

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This suit was originally commenced by Harry G. Tucker; he died while the case was pending, and it proceeded in the name of the administratrix of his estate, hereinafter referred to as plaintiff. The suit was upon a promissory note and plaintiff had judgment against defendants for $2,400 from which they appeal.

The declaration was in assumpsit, alleging the execution on September 15, 1913, by the National Fuel Saver Corporation, of a promissory note for $2,000, due four months after date, to the order of H. G. Tucker, with interest at six per cent. from maturity, which was indorsed by the defendants. A copy of the note was attached to the declaration, and also plaintiff's affidavit of the amount due. Defendants filed an affidavit of merits, which was stricken by order of court, and by leave a second amended affidavit was filed by each of them. Upon motion the second amended affidavits were stricken, and defendants electing to stand by such affidavits an order of default was entered for want of affidavits of merits and judgment entered upon plaintiff's affidavit of the amount due.

Defendants say in this court that they must be

243 - 24108

BYRIL TUCKER, Administratrix of the Estate of HENRY C. TUCKER, deceased, Appellee, vs. CARL MUELLER and HENRY B. McKEAN, Appellants.	212 I.A. 651 APPEAL FROM 2ND DIST. COURT, COOK COUNTY.

MR. JUSTICE MOSHER DELIVERED THE OPINION OF THE COURT.

This suit was originally commenced by Henry C. Tucker; he died while the case was pending, and it proceeded in the name of the administratrix of his estate, hereinafter referred to as plaintiff. The suit was upon a promissory note and plaintiff had judgment against defendants for $2,400 from which they appeal.

The declaration was in assumpsit, alleging the execution on September 13, 1913, by the national Steel Saver Corporation, of a promissory note for $2,400, due four months after date, to the order of H. C. Tucker, with interest at six per cent. From maturity, which was indorsed by the defendants. A copy of the note was attached to the declaration, and also plaintiff's affidavit of the amount due. Defendants filed an affidavit of merits, which was stricken by order of court, and by leave a second amended affidavit was filed by each of them. Upon motion the second amended affidavits were stricken, and defendants electing to stand by such affidavits an order of default was entered for want of affidavits of merits and judgment entered upon plaintiff's affidavit of the amount due.

Defendants say in this court that they had be

deemed indorsers only, as no words appear upon the instrument indicating an intention to be otherwise bound, and that as such indorsers they were entitled to notice of dishonor, and that in the absence of such notice they are discharged from liability.

We are of the opinion that this point is without merit for the reason, among others, that the pleadings show the note was executed for the benefit of the defendants and, therefore, they come within the provision of the act which makes notice unnecessary in order to charge an indorser. Section 80 of the Negotiable Instrument Law (Illinois Stats., Hurd, 1915-16) provides: "Presentment for payment is not required to charge an indorser where the instrument was made or accepted for his accommodation"; and section 114 reads: "Notice of dishonor is not required to be given to an indorser in either of the following cases: * * * 3. Where the instrument was made or accepted for his accommodation." That defendants are accommodation indorsers is not denied in their affidavits. They admit that they were stockholders in the National Fuel Saver Corporation. The note was signed by the defendant McMeal as secretary and treasurer, while the instrument shows that the defendant Mueller was the corporation's general manager. Defendants' affidavits state that at the time the note was executed the corporation was without funds and that it was necessary to raise funds to promote its interest. Under such circumstances we are of the opinion that the note was executed for the benefit of the indorsers, as well as of the maker and payee, and that the note was made for their accommodation, and under the provisions of the Ne-

denoted indorsers only, as no words appear upon the instrument indicating an intention to be interpreted [illegible], and that as such indorsers they were entitled to notice of dishonor, and that in the absence of such notice they are discharged from liability.

We are of the opinion that this point is well taken on merit for the reason, among others, that the [illegible] adding upon the note was executed for the benefit of the defendants and, therefore, they come within the provision of [illegible] which makes notice unnecessary in order to charge an indorser.

Section 80 of the Negotiable Instrument Law (Illinois Stats., Hurd, 1913-14) provides: "Presentment for payment is not required to charge an indorser where the instrument has made or accepted for his accommodation"; and section 114 reads: "Notice of dishonor is not required to be given to an indorser in either of the following cases: [illegible] 3. Where the instrument was made or accepted for his accommodation." Thus defendants are accommodation indorsers is not denied in their affidavits. They claim that they were incorporators in the National Steel Saver Corporation. The note was signed by the defendant Morsel as secretary and treasurer, and the instrument shows that the defendant Taylor was the corporation's general manager. Defendants' affidavits state that at the time the note was executed the corporation had no assets or funds and that it was necessary to raise funds to promote its interest. Under such circumstances we are of the opinion that the note was executed for the benefit of the [illegible], as well as of the maker and payee, and [illegible] for their accommodation, [illegible] Section 29 of the "e-

gotiable Instrument Law they were not entitled to notice.

In Mercantile Bank of Memphis v. Busby, 120 Tenn. 652 (the Negotiable Instrument laws of Tennessee and Illinois are alike), the court arrived at a like conclusion upon facts similar to those before us, holding that as it appeared "that this note was in reality executed for the benefit of every person whose name appears on it" the indorser was not entitled to notice.

Defendants assert a release of their liability. Defendants say in their affidavits that Harry G. Tucker, the payee named in the note, and also these defendants, were stockholders in the National Fuel Saver Corporation, the maker of the note; that the note was given in order that the corporation might raise funds of which it was in need in order to establish a market and to sell its stock; that prior to the time the note became due the defendants requested Tucker to present his note to the corporation for payment, stating that it would then be paid as the corporation had sufficient funds for this purpose, and that thereupon Tucker stated he did not need the funds but that he was willing to cancel and turn in his note, which was then in his deposit box, upon his receiving credit on the books of the corporation for the amount of the note, and that he would release defendants from liability; that thereupon Tucker was given credit upon the books of the corporation for the amount of the note and he promised to produce the note and cancel the same, but never did so. We are in accord with the contention of counsel for plaintiff that these facts do not show a release, but merely an agreement to release, for which there was no valuable consideration received by Tucker, and hence it was a mere nudum pactum. The transfer of the indebtedness of the corporation from a note to a credit charge due Tucker on the books was simply a change

gotiable instrument law they were not entitled to notice.

In Mercantile Bank of Memphis v. Busby, 130 Tenn. 682 (the Negotiable Instrument laws of Tennessee and Illinois are alike), the court arrived at a like conclusion upon facts similar to those before us, holding that as it appeared "that this note was in reality executed for the benefit of every person whose name appears on it" the indorser was not entitled to notice.

Defendants assert a release of their liability. Defendants say in their affidavits that Harry G. Tucker, the payee named in the note, and also these defendants, were stockholders in the National Fuel Gas Corporation, the maker of the note; that the note was given in order that the corporation might raise funds of which it was in need in order to establish a market and to sell its stock; that prior to the time the note became due the defendants requested Tucker to present his note to the corporation for payment, stating that it would then be paid as the corporation had sufficient funds for this purpose, and that thereupon Tucker stated he did not need the funds but that he was willing to cancel and turn in his note, which was then in his deposit box, upon his receiving credit on the books of the corporation for the amount of the note, and that he would release defendants from liability; that thereupon Tucker was given credit upon the books of the corporation for the amount of the note and he promised to produce the note and cancel the same, but never did so. We are in accord with the contention of counsel for plaintiff that these facts do not show a release, but rather an agreement to release, for which there was no valuable consideration received by Tucker, and hence it was a mere naked promise. The transfer of the indebtedness of the corporation from a note to a credit charge due Tucker on the books was simply a change

in form without affecting the obligation of the corporation; the only change affecting the status of the parties was the alleged agreement to release the indorsers from liability. Such an agreement without consideration is of no avail. As was said in Wilson v. Keller. 9 Ill. App. 347, referring to Addison on Contracts, 7th ed., p. 267:

> "The release of a cause of action ex contractu, not based on a bill of exchange or promissory note, could be accomplished only, at common law, by a release under seal or by an executed agreement, where there was a quid pro quo, termed in law an accord and satisfaction. But an agreement to abandon a claim, unless there be a consideration shown, is a mere nudum pactum."

See also Badger Advertising Co. v. U. S. Music Co., 180 Ill. App. 316, and Davidson v. Burke, 143 Ill. 139. The general rule is stated in 34 Cyc., page 1048, thus: "A release must either be under the seal of the releasor or be supported by a sufficient consideration; otherwise it is nudum pactum and void." If Tucker had produced the note and canceled the same the defendants might be in a position to plead an executed agreement, but as this was not done they have only an agreement to release founded on no consideration, and hence the defense asserted must fail.

A suggestion is made that due diligence in the collection of the note does not appear, but if, as we have held, defendants were accommodation indorsers lack of diligence, so long as the statute of limitations had not run, is of no importance.

As to plaintiff's assignment of cross-errors, - the affidavit of plaintiff's claim was made on May 16, 1917, asserting that there was then due the sum of $2,400; judgment was entered on November 22, 1917, for this amount. Plaintiff moved the court to enter judgment on the note computing in-

in form without affecting the obligation of the consideration; the only change affecting the status of the parties was the alleged agreement to release the indorsers from liability. Such an agreement without consideration is of no avail. As was said in Wilson v. Keller, 9 Ill. App. 647, referring to Addison on Contracts, 7th ed., p. 1077:

> "The release of a cause of action ex contractu, not based on a bill of exchange or promissory note, could be accomplished only, at common law, by a release under seal or by an executed agreement, where there was a mutual pro quo, termed in law an executed and satisfaction. But an agreement to abandon a claim, unless there be a consideration shown, is a mere nudum pactum."

See also Badger Advertising Co. v. L. J. Music Co., 167 Ill. App. 316, and Davidson v. Burke, 143 Ill. 158. The general rule is stated in 36 Cyc., page 1146, thus: "A release must either be under the seal of the releasor or be supported by a sufficient consideration; otherwise it is nudum pactum and void." If Tucker had produced the note and concealed the same the defendants might be in a position to plead an executed agreement, but as this was not done they have only an agreement to release founded on no consideration, and hence the defense asserted must fail.

A suggestion is made that the difference in the collection of the note does not appear, but if, as we have held, defendants were accommodation indorsers, no of difference, so long as the statute of limitations had not run, is of no importance.

As to plaintiff's [illegible] the affidavit of plaintiff's claim was made on [illegible], 1917, asserting that there was [illegible] judgment was entered on November 16, 1917, for this claim. Plaintiff moved the court to enter judgment on the note [illegible]

terest up to the date of the entry of judgment, but this motion was denied; and plaintiff contends that this was error. Upon the record before us we shall not disturb the action of the court. If the note had been introduced in evidence, with a computation of the interest thereon to the date of the entry of judgment, plaintiff would have been entitled to such interest, but no evidence whatever was presented to the court; plaintiff had judgment solely upon her affidavit of the amount due upon default of the defendants for want of affidavits of defense. For this reason we shall not change the amount of the judgment which, for the reasons above indicated, is affirmed.

AFFIRMED.

terest up to the date of the entry of judgment, but this motion was denied; and plaintiff contends that this was error. Upon the record before us we shall not disturb the action of the court. If the note had been introduced in evidence, with a computation of the interest thereon to the date of the entry of judgment, plaintiff would have been entitled to such interest, but no evidence whatever was presented to the court; plaintiff had judgment solely upon her affidavit of the amount due upon default of the defendants for want of affidavits of defense. For this reason we shall not change the amount of the judgment which, for the reasons above indicated, is affirmed.

AFFIRMED.

281 - 24208

MYRTLE CLELAND,
Appellee,

vs.

FRANK PARMELEE COMPANY,
a corporation,
Appellant.

212 I.A. 651

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover for losses of personal property while in possession of the defendant for carriage, upon trial before the court had judgment for $359.25 from which the defendant appeals.

The evidence tends to show that plaintiff and her husband were removing their personal and household effects from Iowa to Chicago; that a portion of their wearing apparel, with some kitchen utensils and household articles, was packed in an ordinary wooden packing box and the lid fastened on by nails. Plaintiff testified that without her knowledge and contrary to her intention some jewelry, consisting of rings, was packed in this box. The box was checked as baggage from Iowa to Chicago over the Rock Island railroad, and at the station in Chicago the baggage check was exchanged with a representative of the Parmelee Company, the defendant, for one of its checks, with instructions to deliver the box to plaintiff's residence in Chicago; that when the driver for the Parmelee Company undertook to make delivery to plaintiff it developed that the original box in which the goods were packed had been broken and the contents, in part, placed in another box which the driver tendered to plaintiff. Upon opening it, plaintiff says, some of the articles packed in the original box were missing and some of them damaged; that the

MYRTLE GERLAND,
Appellee,

vs.

FRANK PARMELEE COMPANY,
a corporation,
Appellant.

21210.A. 631

Appeal from the Municipal Court
of Chicago.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit to recover for losses of personal property while in possession of the defendant for carriage, upon trial before the court and jury for $359.25 from which the defendant appeals.

The evidence tends to show that plaintiff and her husband were removing their personal and household effects from Iowa to Chicago; that a portion of their wearing apparel, with some kitchen utensils and household articles, was packed in an orange wooden packing box and the lid fastened on by nails. Plaintiff testified that without her knowledge and control, a new Indestructo trunk jewelry, containing of rings, was packed in this box. The box was checked as baggage from Iowa to Chicago over the Rock Island railroad, and at the station in Chicago the baggage clerk was accompanied with a representative of the defendant company, the defendant, for one of its checks, with instructions to deliver the box to plaintiff's residence in Chicago; that upon the driver for the Parmelee Company undertook to make delivery to plaintiff it developed that the original box in which the goods were packed had been broken and the contents, in part, placed in another box which the driver tendered to plaintiff. Upon opening it, plaintiff says, some of the articles placed in the original box were missing and some of them damaged; that the

rings were missing; that she did not know the rings had been packed in the box in Iowa until she was told by her husband after it had started on its journey; that the rings consisted of one diamond, originally costing $150 but worth at the present time three or four hundred dollars, according to the testimony of plaintiff and her husband; there was also an emerald ring, a Mexican opal ring, a ruby and pearl ring, and two gold rings.

We do not think it reversible error for the court to have received the testimony of Mr. Cleland, the husband of plaintiff; he was competent under the statute to testify as to the separate property of his wife. Chapter 51, on Evidence, sec. 5.

Defendant questions the qualification of plaintiff to testify as to the value of the articles lost. Most of these were articles in common use, such as a frying pan, electric iron, toaster, etc., concerning which a housewife would be presumed to know the value. Parmelee v. Raymond, 43 Ill. App. 609.

The competency of plaintiff to testify as to the present value of the diamond ring might well be questioned, but in view of our conclusion it is unnecessary to pass upon this.

In Parmelee v. Lowitz, 74 Ill. 116, the appellant was the predecessor of the defendant in the instant case and was engaged in the same kind of business. It was there held that the appellant was clearly a common carrier of goods as well as passengers in the city of Chicago, and that unless the owner of the goods has practiced a fraud or imposition upon the carrier it is answerable for the contents of the box or parcel intrusted to it. We are of the opinion that the circumstances

rings were missing; that she did not know the rings had been packed in the box in Iowa until she was told by her husband after it had started on its journey; that the rings consisted of one diamond, originally costing $150 but worth at the present time three or four hundred dollars, according to the testimony of plaintiff and her husband; there was also an emerald ring, a Mexican opal ring, a ruby and pearl ring, and two gold rings.

We do not think it reversible error for the court to have received the testimony of Mr. Gleason, the husband of plaintiff; he was competent under the statute to testify as to the separate property of his wife. Chapter 51, on Evidence, sec. 5.

Defendant questions the qualification of plaintiff to testify as to the value of the articles lost. Most of these were articles in common use, such as a frying pan, electric iron, toaster, etc., concerning which a housewife would be presumed to know the value. Lawrence v. Raymond, 68 Ill. App. 600.

The competency of plaintiff to testify as to the present value of the diamond ring might well be questioned, but in view of our conclusion it is unnecessary to pass upon this.

In Lemmlee v. Lowitz, 74 Ill. 116, the appellant was the predecessor of the defendant in the instant case and was engaged in the same kind of business. It was there held that the appellant was clearly a common carrier of goods as well as passengers in the city of Chicago, and that unless the owner of the goods has precluded a fraud or imposition upon the carrier it is answerable for the contents of the box or parcel intrusted to it. We are of the opinion that the circumstances

of the case before us place it within the exception to the general rule. While plaintiff may not have intended to make any misrepresentation, it was a fraud in fact upon the defendant to tender it for transportation as baggage an ordinary wooden packing box packed with clothing, kitchen and household utensils, among which was personal jewelry of considerable value. The fact that it was placed in such a receptacle contrary to the intention of the owner, indicates that in her opinion such mode of transporting jewelry was unreasonable and unsafe. It was an imposition under all the circumstances to intrust defendant with possession of these rings in this way, and it should not be held liable for the value of the same when lost.

We hold that the court should not have allowed plaintiff anything for the rings, and plaintiff is not entitled to recover for the value of the old coins, which belonged to Mr. Cleland; these were valued by the coin dealer at $42.50. It was proper to find the defendant liable for the other articles, either missing or damaged as shown by the testimony. The value of these latter articles aggregates $62.50. If, therefore, plaintiff will within ten days from the date of the filing hereof file a remittitur in this court of $296.75 the judgment will be affirmed for $62.50; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR; OTHERWISE REVERSED AND REMANDED.

of the case before us place it within the exception to the general rule. While plaintiff may not have intended to make any misrepresentation, it was a fraud in fact upon the defendant to tender it for transportation as baggage an ordinary wooden packing box packed with clothing, kitchen and household utensils, among which was personal jewelry of considerable value. The fact that it was placed in such a receptacle contrary to the instruction of the owner, indicates that in her opinion a common mode of transporting jewelry was unconscionable and unsafe. It was an imposition under all the circumstances to instruct defendant with possession of such things in this way, and it should not be held liable for the value of the same when lost.

We hold that the court should not have allowed plaintiff anything for the things, and plaintiff is not entitled to recover for the value of the old coins, which belonged to Mr. [illegible]; these were valued by the coin dealer at $[illegible]. It was proper to find the defendant liable for the other articles, either missing or damaged as shown by the testimony. The value of these latter articles approximates $[illegible]. If, therefore, plaintiff will within ten days from the date of the filing hereof file a remittitur in this court of $[illegible] the judgment will be affirmed for $[illegible]; otherwise it will be reversed and the cause remanded.

APPELLEE'S MOTION TO DISMISS [illegible]

REVERSED AND REMANDED.

304 - 24231

CHICAGO TITLE & TRUST COMPANY

vs.

MARTHA V. COTTLE et al.

MARTHA V. COTTLE,
Appellant,

vs.

JEROME P. BOWES, N. C. CHRISTENSEN and E. C. LINDQUIST, trading as Christensen Hardware Co., and ALEXANDER PETERSON,
Appellees.

212 I.A. 651

Appeal from

Superior Court,

Cook County.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The Chicago Title & Trust Company filed a bill of interpleader alleging that it held in escrow a trust deed and notes but that defendants had made conflicting claims therefor which it was unable to determine. After hearing the chancellor decreed adversely to the claim of Martha V. Cottle, a defendant, and she appeals to this court seeking a reversal of this decree.

The complainant asserted in its bill that on April 26, 1916, Jerome P. Bowes deposited with it in escrow a warranty deed from Martha V. Cottle and husband to Edward J. Lawless and wife, which conveyed a lot in the city of Chicago, hereafter referred to as lot 16; Lawless deposited the trust deed in question conveying this lot, and 66 promissory notes totaling $1,000; that under the escrow agreement it was provided that if upon the continuation of the abstract no other conveyances or judgments appeared the notes and trust deed securing the same were to be delivered to the order of Martha V. Cottle; that on the day following this escrow deposit certain attorneys filed a notice with the recorder of deeds of

CHICAGO TITLE & TRUST COMPANY

vs.

MARTHA V. COTTLE et al.

MARTHA V. COTTLE,
Appellant,

vs.

JEROME F. BOWEN, H. C. CHRISTENSEN and H. C. LINDQUIST, trading as Christensen Hardware Co., and ALEXANDER PETERSON,
Appellees.

Appeal from

Superior Court,

Cook County.

21214.651

MR. JUSTICE MOSHONEY DELIVERED THE OPINION OF THE COURT.

The Chicago Title & Trust Company filed a bill of interpleader alleging that it held in escrow a trust deed and notes but that defendants had made conflicting claims therefor which it was unable to determine. After hearing the chancellor decreed adversely to the claim of Martha V. Cottle, a defendant, and she appeals to this court seeking a reversal of this decree.

The complainant asserted in its bill that on April 26, 1916, Jerome F. Bowen deposited with it in escrow a warranty deed from Martha V. Cottle and husband to Edward J. Lawless and wife, which conveyed a lot in the city of Chicago, hereafter referred to as lot 16; Lawless deposited the trust deed in question conveying this lot, and 56 promissory notes totaling $1,000; that under the escrow agreement it was provided that if upon the consummation of the abstract no other conveyances or judgments appeared the notes and trust deed securing the same were to be delivered to the order of Martha V. Cottle; that on the day following such abstract certain attorneys filed a notice with the recorder of deeds of

Cook County to the effect that the above described property was not that of Mrs. Cottle but that she held title thereto for Jerome P. Bowes; that one Alexander Peterson had commenced an attachment suit in the Municipal Court of Chicago against Bowes and sued complainant as garnishee, and that afterwards the Christensen Hardware Company had filed a creditor's bill in the Superior Court of Cook County against Bowes, Cottle and others, alleging a judgment against Bowes for $214.65 and an execution therefor returned unsatisfied. Compaainant asked that the respective claimants settle and adjust their claims in court, and asserted its willingness to deliver the notes and trust deed to whomsoever the court might decree was entitled to the same.

Bowes filed an answer disclaiming any interest in lot 16 and asserting that Mrs. Cottle, who is his sister, was entitled to the notes and trust deed. Mrs. Cottle also filed her answer alleging that her claim against Bowes was in the sum of $1,400 for board and room furnished by her to Bowes and a minor son; that to secure the payment of this Bowes had purchased another lot and placed the title thereto in her name, but that on February 25, 1915, Bowes desired to sell this other lot and agreed with her that if she would make a deed thereof to Bowes' purchaser and loan him an additional $600 he would secure for her and have placed in her name the title to lot 16 and also another lot, which would secure the indebtedness of $2,000 then owing to her from Bowes; she alleged that this was done and it was agreed that upon any sale of lot 16 the proceeds derived from the equity therein were to be applied on said indebtedness of $2,000, and that she executed and delivered the warranty deed to Lawless and his wife upon the condition and understanding that the proceeds, whether in the form of notes or cash, should be delivered to her in

Cook County to the effect that the above described property was not that of Mrs. Cottle but that she held title thereto for Jerome F. Bowes; that one Alexander Iverson had commenced an attachment suit in the Municipal Court of Chicago against Bowes and said complainant as garnishee, and that afterwards the Christensen Hardware Company had filed a creditor's bill in the Superior Court of Cook County against Bowes, Cottle and others, alleging a judgment against Bowes for $214.65 and an execution therefor returned unsatisfied. Complainant asked that the respective claimants settle and adjust their claims in court, and asserted its willingness to deliver the notes and trust deed to whomsoever the court might decree was entitled to the same.

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payment or partial payment of the indebtedness due from Bowes to her.

Subsequently upon stipulation an order was entered authorizing and directing Lawless and his wife to pay the clerk of the court the amount due on their notes, and they were dismissed out of the case.

Upon hearing the parties entered into a stipulation that the claim of Peterson against Bowes, when adjudicated, and also the claim of the Christensen Hardware Company, should be paid out of the notes and money deposited with the clerk of the Superior Court, provided the court found that they belonged to Bowes and not to Mrs. Cottle.

The question for our determination is as to the correctness of the conclusion of the chancellor, after hearing the testimony and observing the witnesses, that Mrs. Cottle had no interest in the notes and trust deed but that the interest therein at all times remained in Bowes.

The evidence presented to the chancellor tended to show that Bowes was a real estate operator in Chicago for seven or eight years prior to 1915, operating a private bank part of the time; that subsequently to 1908 he was in the habit in buying and selling real estate not to take title in his own name but to take title in the name of William T. Peterson, one of his salesmen, or of his sister, Mrs. Cottle; that when a sale or mortgage was made of property thus owned by Bowes, the papers were signed by the person holding the title at the request of Bowes. It appears clearly from the evidence that the reason Bowes adopted this practice was to escape judgments against him becoming a lien upon his real estate. The chancellor could find that lot 16 in question

payment or partial payment of the indebtedness due from Howes to Barr.

Subsequently upon stipulation an order was entered authorizing and directing Lawless and his wife to pay the clerk of the court the amount due on their notes, and they were dismissed out of the case.

Upon hearing the parties entered into a stipulation that the claim of Peterson against Howes, when adjudicated, and also the claim of the Chicagoan Hardware Company, should be paid out of the notes and money deposited with the clerk of the Superior Court, provided the court found that they belonged to Howes and not to Mrs. Cottle.

The question for our determination is as to the correctness of the conclusion of the chancellor, after hearing the testimony and observing the witnesses, that Mrs. Cottle had no interest in the notes and trust deed but that the interest therein at all times remained in Howes.

The evidence presented to the chancellor tended to show that Howes was a real estate operator in Chicago for seven or eight years prior to 1918, operating a private bank part of the time; that subsequently to 1918 he was in the habit in buying and selling real estate not to take title in his own name but to take title in the name of William T. Peterson, one of his salesmen, or of his sister, Mrs. Cottle; that when a sale or mortgage was made of property thus owned by Howes, the papers were signed by the person holding the title at the request of Howes. It appears clearly from the evidence that the reason Howes assigned for the practice was to escape judgments against him involving a lien on his real estate. The chancellor could find that at the position

formerly belonged to one Conway; that in 1914 Bowes contracted to build certain houses for Conway, and took this lot with another not in question, as part payment therefor, and in pursuance of his usual practice Bowes caused the deeds to the lots to be made in the name of William T. Peterson; that shortly afterwards Peterson, under Bowes' direction, executed a trust deed to secure a loan on the lot, and the proceeds thereof were kept by Bowes, Peterson receiving no part. There was direct testimony that subsequently Bowes, apprehensive lest there might be judgments against Peterson, requested him to convey the property to defendant Cottle, which was accordingly done. Peterson testifies that this request was made of him by Bowes, and this reason given for the request; Bowes denies this.

It is unnecessary to narrate the details of the alleged transaction between Bowes and his sister, Mrs. Cottle. We are of the opinion that there was sufficient evidence for the chancellor to conclude that while it may be true that Bowes was indebted to his sister for board, the particular transaction with reference to lot 16 was no different from several other transactions of the same kind in which Mrs. Cottle took title to property which in fact belonged to Bowes. There are many details connected with the testimony of both Bowes and Mrs. Cottle which tend to discredit the good faith of the transaction as asserted by them. One circumstance is that while Bowes testified that there were no judgments against him, it was subsequently shown that there were in fact several. The court was evidently of the opinion that the claims of Bowes and Mrs. Cottle were part of an attempt by members of the same family to prevent creditors of Bowes from collecting.

The questions involved are primarily as to the

formerly belonged to one Conway; that in 1911 Bowes contracted to build certain houses for Conway, and took title lot with another not in question, as part payment therefor, and in pursuance of his usual practice Bowes caused the deeds to the lots to be made in the name of William T. Peterson; that shortly afterwards Peterson, under Bowes' direction, executed a trust deed to secure a loan on the lot, and the proceeds thereof were kept by Bowes, Peterson receiving no part. There was direct testimony that subsequently Bowes, apprehensive lest there might be judgments against Peterson, requested him to convey the property to defendant Cottle, which was accordingly done. Peterson testifies that this request was made of him by Bowes, and this reason given for the request, Bowes denies this.

It is unnecessary to narrate the details of the alleged transaction between Bowes and his sister, Mrs. Cottle. We are of the opinion that there was sufficient evidence for the chancellor to conclude that while it may be true that Bowes was indebted to his sister for board, the particular transaction with reference to lot 10 was no different from several other transactions of the same kind in which Mrs. Cottle took title to property which in fact belonged to Bowes. There are many details connected with the testimony of both Bowes and Mrs. Cottle which tend to discredit the good faith of the transaction as asserted by them. The circumstance is true, while Bowes testifies that there were no judgments against him, it was subsequently shown that there were in fact several. The court was evidently of the opinion that the claims of Peterson and Mrs. Cottle were part of an attempt by members of the same family to prevent creditors of Bowes from collecting.

The questions involved herein rather lie as to the

facts, and after considering the respective stories we see no reason to disagree with the conclusion of the chancellor, and the decree is affirmed.

AFFIRMED.

facts, and after considering the respective stories we see no reason to disagree with the conclusion of the chancellor, and the decree is affirmed.

AFFIRMED.

352 - 24279

DONALD L. MORRILL,
Appellee,

vs.

CHICAGO TOY PIANO CO.,
a corporation,
Appellant.

212 I.A. 651

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This was a joint action for possession of demised premises and rent for 24 days at the rate of five dollars per day, the amount specified in the lease in case of a holding over beyond the expiration of the term, September 30, 1917. Upon trial by the court judgment was for defendant on the issue for possession, but plaintiff had judgment for use and occupation of the premises in the sum of $86.88, as to which latter judgment defendant appeals.

We have noted defendant's explanation of the importance of this appeal as relating to a suit pending against plaintiff and others for the alleged conversion of defendant's property. This court has not before it any question save the propriety of the judgment for rent; what is here said is not to be construed as having any bearing, one way or another, on any other proceeding.

Plaintiff became the owner of the premises in question, a three-story brick building used for manufacturing purposes, December 27, 1916, and the leases therein which had been executed by the former owner, the Swedish-American Telephone Manufacturing Company, were thereupon assigned to him; the latter company remained in the building as a tenant of plaintiff.

352 - 24279

DONALD L. MORRILL, Appellee,	21214.651
vs.	APPEAL FROM MUNICIPAL COURT
CHICAGO TOY PIANO CO., a corporation, Appellant.	OF CHICAGO.

MR. JUSTICE MOSHER DELIVERED THE OPINION OF THE COURT.

This was a joint action for possession of demised premises and rent for 24 days at the rate of five dollars per day, the amount specified in the lease in case of a holding over beyond the expiration of the term, September 30, 1917. Upon trial by the court judgment was for defendant on the issue for possession, but plaintiff had judgment for use and occupation of the premises in the sum of $86.88, as to which latter judgment defendant appeals.

We have noted defendant's explanation of the importance of this appeal as relating to a suit pending against plaintiff and others for the alleged conversion of defendant's property. This court is not before it any question save the propriety of the judgment for rent; what is here said is not to be construed as having any bearing, one way or another, on any other proceeding.

Plaintiff became the owner of the premises in question, a three-story brick building used for manufacturing purposes, December 27, 1916, and the lease therein which had been executed by the former owner, the Western-American Telephone Manufacturing Company, were thereupon assigned to him; the latter company remained in the building as a tenant of plaintiff.

Defendant occupied space on the third floor of the building under a lease originally between the Telephone Company and A. D. Foyer & Co., wherein among other things it was provided that elevator service was to be furnished by the lessor. Such lease, as stated, expired September 30, 1917, and defendant prepared to vacate. Rent for August and September had been paid, after suit for it had been brought and judgment had. It appears from the testimony of plaintiff that he had an agreement with the Telephone Company to furnish power with which to run the elevator. Defendant started to move out September 28th, and part of its belongings was carted away, but before nearly all of the stock and goods were out operations were suspended due to the lack of power in the elevator. Just what caused this is not altogether clear. For some unexplained reason a bitter feeling seems to have existed between Foyer, president of the defendant company, and Keene, president of the Telephone Company, and this probably was the starting point of all the trouble. The evidence is decidedly conflicting and no purpose would be served by a detailed recital of it. Were defendant's contention that it could not remove its effects because of the failure and refusal of Keene to furnish elevator power conceded, could plaintiff be charged with and held accountable for such conduct on the part of Keene?

We are of the opinion that the defendant company erroneously and inconsistently represent Morrill, the plaintiff, and the Swedish-American Telephone Company as a unit, and this is especially apparent from the letter of defendant to Morrill, dated October 29, 1917, as follows:

Defendant occupied space on the third floor of the building under a lease originally between the telephone company and A. D. Joyce & Co., wherein among other things it was provided that elevator service was to be furnished by the lessor. Such lease, as stated, expired June 30, 1917, and defendant prepared to vacate. But for August and September had been paid, after suit for it had been brought and judgment had. It appears from the testimony of plaintiff that he had an agreement with the telephone Company to furnish power with which to run the elevator. Defendant started to move out September 28th, and part of its belongings was carted away, but before nearly all of the stock and goods were out operations were suspended due to the lack of power in the elevator. Just what caused this is not altogether clear. For some unexplained reason a bitter feeling seems to have existed between Joyce, president of the defendant company, and Keene, president of the Telephone Company, and this probably was the starting point of all the trouble. The evidence is decidedly conflicting and no purpose would be served by a detailed recital of it. Here defendant's contention that it could not remove its effects because of the failure and refusal of Keene to furnish elevator power contended, could plaintiff be charged with and held accountable for such conduct on the part of Keene?

We are of the opinion that the defendant company exceedingly and inconsiderately terminated matters, the plaintiff, and the Swedish-American Telephone Company as a unit, and this is especially apparent from the letter of defendant to Morrill, dated October 24, 1917, as follows:

"In reply to your letter of the 23rd, demanding possession of the premises described as * * * we beg leave to advise that we gave up possession of these premises before October 1st, 1917, and since then have not been and are not now in possession of these premises.

"As you know, we made every effort and did everything in our power to remove these goods prior to October 1st, but owing to your actions and those of Swedish-American Telephone Manufacturing Company, of which you are the President, we were not only hindered and delayed in removing such goods as we were successful in removing, but were prevented from removing the rest. We regard this as a conversion by yourself and the Swedish-American Telephone Manufacturing Company of the remainder of these goods, and shall hold you and the Company responsible, not only for the value of the goods, but for all damages we have sustained by reason of your action."

To this Morrill replied on October 30th:

"I have yours of the 29th inst., and contents noted.

"I feel obliged to differ with you in the statement that you gave up possession of these premises before October 1, 1917. As a matter of fact you did not even technically give up possession of the premises until you surrendered the keys on or about October 24th. You are still actually in possession of the premises on account of the large amount of material left there. This material should be removed by you at once.

"You are also in error in assuming that I am the President of the Swedish-American Telephone Manufacturing Company. I have not been its President for nearly two years past, and have had no voice in its management since May 26, 1917.

"The materials on the premises formerly occupied by you are subject to your order and should be removed at once. I disclaim any conversion of them by me, and trust that you will remove them without delay if they are of any value to you."

The statements in this communication from Morrill are supported by the record.

Subsequent to October 2nd defendant appears to have made no effort whatever to remove its goods remaining in the building. It cannot be said that Morrill personally at any time prevented their removal, and the record fails to show that he ever constituted Keene or the Telephone

"In reply to your letter of the 25th, demanding possession of the premises described as * * * we beg leave to advise that we gave up possession of these premises before October 1st, 1917, and since then have not been and are not now in possession of these premises.

"As you know, we made every effort and did everything in our power to remove these goods prior to October 1st, but owing to your actions and those of Swedish-American Telephone Manufacturing Company, of which you are the President, we were not only hindered and delayed in removing such goods as we were successful in removing, but were prevented from removing the rest. We regard this as a conversion by yourself and the Swedish-American Telephone Manufacturing Company of the remainder of these goods, and shall hold you and the Company responsible, not only for the value of the goods, but for all damages we have sustained by reason of your action."

To this Morrill replied on October 30th:

"I have yours of the 25th inst., and contents noted.

"I feel obliged to differ with you in the statement that you gave up possession of these premises before October 1, 1917. As a matter of fact you did not even technically give up possession of the premises until you surrendered the keys on or about October 25th. You are still actually in possession of the premises on account of the large amount of material left there. This material should be removed by you at once.

"You are also in error in assuming that I am the President of the Swedish-American Telephone Manufacturing Company. I have not been its president for nearly two years past, and have had no voice in its management since May 26, 1917.

"The materials on the premises formerly occupied by you are subject to your order and should be removed at once. I disclaim any conversion of them by me, and trust that you will remove them without delay if they are of any value to you."

The statements in this communication from Morrill are supported by the record.

Subsequent to October and defendant appears to have made no effort whatever to remove the goods remaining in the building. It cannot be said that Morrill personally at any time prevented their removal, and the record fails to show that he ever constituted Keene or the Telephone

Company an agent by whose acts he could be bound. The failure of the Telephone Company to furnish power for the elevator would doubtless be in violation of its agreement with Morrill, but the attempt to charge Morrill with this on the ground that it was the act of his agent falls short on the evidence presented.

It is asserted that the judgment for rent is not predicated upon evidence. As above indicated, plaintiff is not liable for the unauthorized act of defendant's co-tenant or one of its officers. According to the testimony of Mr. Foyer himself the goods in question were scattered and occupied "probably two-thirds of the space." No showing was made that any of the leased space was used by plaintiff during the period covered by the judgment, or that there was opportunity to re-rent all or any portion of it. While the lease in such circumstances provided for the payment of five dollars per day, the judgment apparently was figured on the basis of the regular monthly rental. We do not think that defendant has just ground for complaint in this respect.

It is contended further that the court's refusal to pass on some thirty-seven propositions of law submitted by defendant is reversible error. An examination of these propositions reveals that they collectively relate to the question of the unlawful withholding of possession, an issue upon which the trial court found for the defendant; no cross errors are assigned on this finding; defendant will not be heard to complain of the action of the trial court touching an issue determined in its favor.

No sufficient reason appearing why the judgment herein for rent should not stand, it is accordingly affirmed.

AFFIRMED.

company an agent by whose acts he could be bound. The failure of the Telephone Company to furnish power for the elevator would doubtless be in violation of its agreement with Morrill, but the attempt to charge Morrill with this on the ground that it was the act of his agent falls short on the evidence presented.

It is asserted that the judgment for rent is not predicated upon evidence. As above indicated, plaintiff is not liable for the unauthorized act of defendant's co-tenant or one of its officers. According to the testimony of Mr. Foyer himself the goods in question were monitored and occupied "probably two-thirds of the space." To above-ing was made that any of the leased space was used by plaintiff during the period covered by the judgment, or that there was opportunity to re-rent all or any portion of it. While the lease in such circumstances provided for the payment of five dollars per day, the judgment apparently was figured on the basis of the regular monthly rental. We do not think that defendant has just ground for complaint in this respect.

It is contended further that the courts refused to pass on some thirty-seven propositions of law submitted by defendant in reversible error. An examination of these propositions reveals that they collectively relate to the question of the unlawful withholding of possession, an issue upon which the trial court found for the defendant; no error are assigned on this finding; defendant will not be heard to complain of the action of the trial court touching an issue determined in its favor.

No sufficient reason appears why the judgment herein for rent should not stand. It is accordingly affirmed.

AFFIRMED.

This opinion with respective changes of title was filed in cases from No. 24454 to 24491, on October 11, 1918.

24454 - 2449/mc

212 I.A. 651

CITY OF CHICAGO,
Appellee,

vs.

ADOLPH AARONSTEIN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24323, opinion filed by this court March 25, 1918.

AFFIRMED.

This opinion with respective changes of title was filed in cause from No. 24464 to 24491, on October 11, 1918.

24464 - 24491

CITY OF CHICAGO,
Appellee,

vs.

ANDRIA ANDERSZIN,
Appellant.

24464 - 24491

CITY OF CHICAGO,
Appellee,

vs.

ANDRIA ANDERSZIN,
Appellant.

MR. JUSTICE DUNHAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute, Section 100, chapter 110, Practice Act, Jurisdiction and procedure. Such circumstances the Appellate Court may affirm the judgment, and this is accordingly ....., following the precedent set forth in City v. Dalmatsky, decided ..., 1918, ... filed by this court March 22, 1918.

AFFIRMED.

376 - 23721

212 I.A. 652

W. H. FINNEY,
Appellee,

vs.

ANTON J. CERMAK and
SEWELL-CLAPP ENVELOPES,
a corporation,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment finding the right of certain personal property in the plaintiff, and assessing the cost of the suit against said defendants.

It appears from the record that the Sewell-Clapp Envelopes, a corporation, obtained a judgment against one Helen Clare, Inc., a corporation, and caused an execution to be issued and placed in the hands of Anton J. Cermak, Bailiff of the Municipal Court of Chicago, who levied same on the property in question; that thereafter William H. Finney, claiming to be the owner of the property levied upon, instituted the instant suit against the said Cermak, individually, and Sewell-Clapp Envelopes, to try the right of said property, which said suit resulted in the judgment herein complained of. Although several errors have been assigned and argued by defendants, we deem it necessary to consider only one, viz., that the court erred in entering judgment against the said Cermak, individually instead of in his official capacity.

Plaintiff concedes that the said Cermak was liable only in his official capacity but insists that the alleged error in suing him individually was cured

375 - 82721

G. M. KINNEY,
Appellee,

vs.

ANTON J. CERMAK and
SEWELL-CLARP ENVELOPES,
a corporation,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

21214. 652

MR. PRESIDING JUSTICE MORAN
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment finding the right of certain personal property in the plaintiff, and assessing the cost of the suit against said defendants.

It appears from the record that the Sewell-Clarp Envelopes, a corporation, obtained a judgment against one Helen Glaze, Inc., a corporation, and caused an execution to be issued and placed in the hands of Anton J. Cermak, Sheriff of the Municipal Court of Chicago, who levied same on the property in question; that thereafter - although Kinney, claiming to be the owner of the property levied upon, instituted the instant suit against the said defendants, individually, and Sewell-Clarp Envelopes, to try the right of said property, which suit resulted in the judgment herein complained of. The evidence certainly does not assigned and argued by defendants, so does it necessary to consider only one, viz., that the court erred in entering judgment against the sheriff, individually, in lieu of in his official capacity.

Plaintiff concedes that the said Cermak was liable only in his official capacity but insists that the alleged error in suing him individually was cured

by proper amendment made in the trial court. The record discloses, however, that although leave was granted plaintiff to amend the process and pleadings, yet the necessary amendment was not made, and the judgment here presented for review is against the said Cermak, individually. Clearly, such judgment is erroneous in this respect and being erroneous as to one, is erroneous as to all defendants. Accordingly it will be reversed and the cause remanded.

REVERSED AND REMANDED.

by proper amendment made in the trial court. The record discloses, however, that although leave was granted plaintiff to amend the pleadings and plaintiff, yet the necessary amendment was not made, and the judgment here presented for review is against the said Carney, individually. Clearly, such judgment is erroneous in this respect and being erroneous as to one, is erroneous as to all defendants. Accordingly it will be reversed and the cause remanded.

REVERSED AND REMANDED.

401 - 23746

212 I.A. 652

OLIVIA LEE,
Appellee,

vs.

THE BOYLE ICE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Appellee, plaintiff below, brought suit and recovered judgment against appellant for damages for personal injuries sustained on August 2, 1916, when appellant's servant dropped a cake of ice on her foot.

The sole contention made by the defendant is that the evidence fails to show any negligence on the part of its servant at the time and place in question, and that hence the judgment cannot be sustained. However, we are unable to review the record with a view to passing upon defendant's said contention, because we find nothing in the bill of exceptions itself to indicate that it contains all the evidence introduced upon the trial nor does the certificate of the trial judge contain any such recital, - in the absence of which the presumption arises that there was sufficient evidence to sustain the court's finding. (James v. Dexter, 113 Ill. 654; C. R. I. & P. Ry. Co. v. Town of Calumet, 151 Ill. 512; McKnight v. Walker, 119 Ill. App. 138.)

The judgment will therefore be affirmed.

AFFIRMED.

401 - 25746

OLIVIA LEO,
Appellee,

vs.

THE ROYAL ICE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Appellee, plaintiff below, brought suit and recovered judgment against appellant for damages for personal injuries sustained on August 3, 1916, when appellant's servant dropped a cake of ice on her foot.

The sole contention made by the defendant is that the evidence fails to show any negligence on the part of its servant at the time and place in question, and that hence the judgment cannot be sustained. However, we are unable to review the record with a view to passing upon defendant's said contention, because we find nothing in the bill of exceptions itself to indicate that it contains all the evidence introduced upon the trial nor does the certificate of the trial judge contain any such recital, - in the absence of which the presumption arises that there was sufficient evidence to sustain the court's finding. (James v. Dexter, 112 Ill. 664; C. & I. & E. Ry. Co. v. Town of Calumet, 151 Ill. 312; Knight v. Walker, 13 Ill. App. 138.)

The judgment will therefore be affirmed.

AFFIRMED.

443 - 23788

212 I.A. 652

ELABORATED READY ROOFING COMPANY, a corporation,
Appellee,

vs.

UNITED STATES BREWING COMPANY OF CHICAGO, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of $200 in favor of the plaintiff, in an action for damages for the loss of a horse, resulting from a collision of defendant's automobile truck with plaintiff's wagon.

Defendant contends that the verdict is palpably against the weight of the evidence; and that the court erred in refusing to give a certain instruction on its behalf.

The collision took place at the intersection of Fourteenth street and Ashland avenue, in the city of Chicago. Plaintiff's wagon was proceeding north on Ashland avenue and defendant's truck east on Fourteenth street. There was the usual conflict of evidence as to the manner in which the collision occurred.

The evidence submitted on behalf of the plaintiff tended to show that its wagon had partly passed the said intersection when defendant's truck approached from the west on Fourteenth street; that the truck slowed down momentarily at the intersection and then turned north into Ashland avenue as if to continue in the latter direction; that instead of continuing north, however, defendant's

443 - 25788

212 I.A. 652

ALABORATED READY ROOFING COMPANY, a corporation, Appellee,	APPEAL FROM
va.	MUNICIPAL COURT
UNITED STATES BREWING COMPANY OF CHICAGO, a corporation, Appellant.	OF CHICAGO.

MR. PRESIDING JUSTICE MCDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of $200 in favor of the plaintiff, in an action for damages for the loss of a horse, resulting from a collision of defendant's automobile truck with plaintiff's wagon.

Defendant contends that the verdict is majority against the weight of the evidence; and that the court erred in refusing to give a certain instruction on its behalf.

The collision took place at the intersection of Fourteenth street and Ashland avenue, in the city of Chicago. Plaintiff's wagon was proceeding north on Ashland avenue and defendant's truck east on Fourteenth street. There was the usual conflict of evidence as to the manner in which the collision occurred.

The evidence submitted on behalf of the plaintiff tended to show that its wagon had partly passed the said intersection when defendant's truck approached from the west on Fourteenth street; that the truck slowed down momentarily at the intersection and then turned north into Ashland avenue as if to continue in the latter direction; that instead of continuing north, however, defendant's

truck turned sharply to the east and passed in front of plaintiff's horse, - in doing which the right front wheel of defendant's truck ran over and crushed the left front foot of plaintiff's horse; that after the collision, defendant's driver attempted to flee, returning only after he had been overtaken. The evidence adduced on behalf of the defendant tended to show that the two occupants of plaintiff's wagon were conversing just before the collision; that the horse was driven into defendant's truck as the latter was crossing Ashland avenue, and that the truck was veered north into Ashland avenue to avert the impending collision; that the truck proceeded east on Fourteenth street after the collision, without stopping, until an automobile drove alongside it and defendant's driver was informed of the accident and advised to turn back. The foregoing constituted substantially all the evidence bearing directly upon the manner in which the collission occurred. In view of its conflicting nature, we should not be warranted in disturbing the verdict of the jury.

The instruction offered on behalf of defendant and refused by the court was to the effect that if the driver of plaintiff's horse could, in the exercise of ordinary care, have stopped the horse and wagon in time to avoid the accident, plaintiff could not recover. In our opinion, the instruction as offered, was properly refused because it did not purport to be based upon the evidence in the case. We also find that the charge to the jury fully covered this point.

There being no error in the record justifying a reversal the judgment will be affirmed.

AFFIRMED.

truck turned sharply to the east and passed in front of plaintiff's horse, - in doing which the right front wheel of defendant's truck ran over and crushed the left front foot of plaintiff's horse; that after the collision, defendant's driver attempted to flee, returning only after he had been overtaken. The evidence adduced on behalf of the defendant tended to show that the two occupants of plaintiff's wagon were conversing just before the collision; that the horse was driven into defendant's truck as the latter was crossing Ashland avenue, and that the truck was veered north into Ashland avenue to avert the impending collision; that the truck proceeded east on Fewster street after the collision, without stopping, until an automobile drove alongside it and defendant's driver was informed of the accident and advised to turn back. The foregoing constituted substantially all the evidence bearing directly upon the manner in which the collision occurred. In view of its conflicting nature, we should not be warranted in disturbing the verdict of the jury.

The instruction offered on behalf of defendant and refused by the court was to the effect that if the driver of plaintiff's horse could, in the exercise of ordinary care, have stopped the horse and wagon in time to avoid the accident, plaintiff could not recover. In our opinion, the instruction as offered, was properly refused because it did not purport to be based upon the evidence in the case. We also find that the charge to the jury fully covered this point.

There being no error in the record justifying a reversal the judgment will be affirmed.

AFFIRMED.

496 - 23841

212 I.A. 652

LIBBIE SPINER,
Appellee,

vs.

ANTON J. CERMAK, Bailiff of the Municipal Court of Chicago,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in favor of plaintiff (appellee), in an action of replevin brought against appellant, for the recovery of an automobile.

The statement of claim filed by plaintiff set forth that defendant took the goods and chattels of plaintiff and unjustly detained the same, etc. Defendant denied both the taking and detention of the said property, and in a special plea averred that the automobile in question was seized by defendant under a writ of execution sued out of the Municipal Court of Chicago, against one David Spiner; and that the said automobile was at the time of the levy owned by the said David Spiner and not by the plaintiff.

No replication was filed by plaintiff to the said special plea of defendant, and the cause proceeded to a hearing before the court without a jury, by consent of the parties. At the close of plaintiff's evidence defendant moved for a finding in his favor on the ground, among others, that, no replication having been filed to his said special plea, the allegations therein stood admitted and hence he was entitled to a judgment on the pleadings. Plaintiff then asked leave to file a replication, which was granted over the objection of defendant. No replication was filed by plaintiff,

498 - 52841

LIBERTY SPRING,
appellee,

vs.

ARTON J. C. TRAK, Bailiff
of the Municipal Court of
Chicago,
appellant.

MR. PRESIDING JUSTICE MCSMITH
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in favor of plaintiff (appellee), in an action of replevin brought against appellant, for the recovery of an automobile.

The statement of claim filed by plaintiff set forth that defendant took the goods and chattels of plaintiff and unlawfully detained the same, etc. Defendant denies both the taking and detention of the said property, and in a special plea avered that the automobile in controversy was seized by defendant under a writ of execution issued out of the Municipal Court of Chicago, against one David Spiner; and that the said automobile was in the time of the levy owned by the said David Spiner and not by the plaintiff.

No replication was filed by plaintiff to the said special plea of defendant, and the case proceeded to a hearing before the court without a jury, by consent of the parties. At the close of plaintiff's evidence defendant moved for a finding in his favor on the special, second plea, that, no replication having been filed to said special plea, the allegations therein stood admitted and he was entitled to a judgment on the pleadings. The court denied leave to file a replication, and sustained the objection of defendant. No evidence was offered by plaintiff,

however.

Defendant contends that on this state of the record, the court erred in entering judgment for plaintiff. We cannot agree with this contention.

In Kaestner v. First National Bank, 170 Ill. 322, a similar situation was presented, and the court there held that the omission by the plaintiff to file a replication to a special plea requiring one, was waived when defendant went to trial without objection upon this ground. So in the case at bar, when the parties went to trial without the filing of a replication by plaintiff to defendant's said special plea, the point was waived, it being presumed in such case that the issues were joined orally. (Butler v. Natl. Live Stock Ins. Co., 200 Ill. App. 280, and cases there cited.) And since this point was waived by defendant when he went to trial without objection on this ground, the fact that the point was raised at the close of plaintiff's evidence, and that plaintiff afterwards asked for and obtained leave to file a replication and then neglected to file same, did not remove such waiver.

It is also contended by defendant that there is no evidence in the record to support the finding and judgment of the trial court. The court found the right of possession to the said automobile in plaintiff, and we think the evidence sustains such finding.

There being no error in the record which justifies a reversal the judgment will be affirmed.

AFFIRMED.

however.

Defendant contends that on this state of the record, the court erred in entering judgment for plaintiff. We cannot agree with this contention.

In Kasatner v. First National Bank, 170 Ill. App., a similar situation was presented, and the court there held that the omission by the plaintiff to file a replication to a special plea requiring one, was waived when defendant went to trial without objection upon this ground. So in the case at bar, when the parties went to trial without the filing of a replication by plaintiff to defendant's plea special plea, the point was waived, is only presented in such case that the issues were joined. (Miller v. Natl. Live Stock Ins. Co., 3 Ill. App. 589, and cases there cited.) And since this point was waived by defendant when he went to trial without objection on this ground, the fact that the point was raised at the close of plaintiff's evidence, and that plaintiff afterwards made a for and obtained leave to file a replication and then neglected to file same, did not remove such waiver.

It is also contended by defendant that there is no evidence in the record to support the finding and judgment of the trial court. The court found the right of possession to the said automobile in plaintiff, and we think the evidence sustains such finding.

There being no error in the record, the judgment will be affirmed.

AFFIRMED.

512 - 23857

212 I.A. 653

GENEVIEVE KLANER,
Appellee,

vs.

GEORGE KLANER,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT,

This is an appeal from a supplemental order modifying the provisions of a decree of divorce, with respect to the care, custody and control of a minor child of tender years.

The original decree awarded the custody of the said child to appellant, while the supplemental decree awards such custody to appellee, with suitable provision for the visitation of said child on behalf of appellant.

It is insisted by appellant that appellee's petition for the modified decree in question and the evidence introduced in support thereof, fail to disclose a state of facts that would warrant the court in granting the relief sought. An examination of the record, however, discloses that the evidence on the issue in question was conflicting, under which circumstances we cannot disturb the finding of the chancellor. Zimmerman v. Zimmerman, 242 Ill. 552.

The evidence disclosed that appellee was afflicted with a venereal disease, then in its tertiary, or dormant, period, at which stage there was practically no danger of its being communicated to the said child. The record is silent, however, as to the cause of the diseased condition

312 I.A. 653

GWENDLYN KLAMM,
Appellee,

vs.

GEORGE KLAMM,
Appellant.

AS AN ORIGINAL
CIRCUIT COURT,
OTHER DIVISION.

MR. PRESIDING JUSTICE McCULLOUGH
DELIVERED THE OPINION OF THE COURT:

This is an appeal from a supplemental order modifying the provisions of a decree of divorce, with respect to the care, custody and control of a minor child of tender years.

The original decree awarded the custody of the said child to appellant, while the supplemental decree awards such custody to appellee, with suitable provision for the visitation of said child on behalf of appellant.

It is insisted by appellant that appellee's petition for the modified decree in question and the evidence introduced in support thereof, fail to allege a state of facts that would warrant the court in granting the relief sought. An examination of the record, however, discloses that the evidence on the issue in question was conflicting, under which circumstances we cannot disturb the finding of the chancellor. Simonson v. Simonson, 242 Ill. 582.

The evidence disclosed that appellee was afflicted with a venereal disease, then in its tertiary, or torpid, period, at which stage there is practically no danger of its being communicated to the male child. The record is silent, however, as to the cause of the diseased condition

of appellee. That appellant did not consider appellee of immoral character, may be reasonably inferred from the record, since he made no charge of that nature against her in the divorce proceedings, (wherein he filed a cross bill alleging extreme and repeated cruelty on her part,) although it was admitted that for upwards of three years prior to the filing of the cross bill he knew of appellee's diseased condition. And it further appears from the record that appellant, while the divorce proceeding was pending, entered into a stipluation with appellee whereby she was to have the care and custody of the said child. In view of the foregoing circumstances, we are not disposed to disturb the chancellor's finding, and hence the decree will be affirmed.

AFFIRMED.

of appellee. That appellant did not consider appellee of immoral character, may be reasonably inferred from the record, since he made no charge of that nature against her in the divorce proceedings, (wherein he filed a cross bill alleging extreme and repeated cruelty on her part,) although it was admitted that for upwards of three years prior to the filing of the cross bill he knew of appellee's diseased condition. And it further appears from the record that appellant, while the divorce proceeding was pending, entered into a stipulation with appellee whereby she was to have the care and custody of the said child. In view of the foregoing circumstances, we are not disposed to disturb the chancellor's finding, and hence the decree will be affirmed.

AFFIRMED.

520 - 23865

212 I.A. 653

LOUISE J. DAVENPORT,
Appellant,

vs.

JOHN L. DAVENPORT et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Appellant (complainant below) filed a bill to set aside a conveyance of certain real estate located in the city of Chicago, made by her to her son, John D. Davenport, one of the appellees herein, alleging mental incapacity on her part to make a valid conveyance of the property in question, and the exercise of undue influence on the part of her son in procuring the said conveyance to be made to him.

The cause was referred to Master in Chancery Leo J. Doyle, with directions to take and report the evidence, together with his conclusions thereon to the court. A hearing on the issues involved was had before the said master, whose term of office expired before he reported his conclusions thereon. Thereafter counsel for the respective parties to the litigation entered into a stipulation whereby the cause was re-referred to Master in Chancery James H. Poage, with directions to report his conclusions on the testimony "taken, transcribed and signed" before Master Doyle. Pursuant thereto the court entered an order referring the cause to Master Poage for hearing, which said order was "Ok'd" by the solicitors for the respective parties. Subsequently Master Poage filed his report on the testimony taken before Master Doyle, to which said report appellant duly objected and excepted, on the ground that the transcript of the evidence taken before Master

LOUISE J. DAVENPORT,
Appellant,

vs.

JOHN I. DAVENPORT et al.,
Appellees.

MR. JUSTICE DOCTOR delivered
DELIVERED THE OPINION OF THE COURT.

Appellant (complainant below) filed a bill to set aside a conveyance of certain real estate located in the city of Chicago, made by her to her son, John I. Davenport, one of the appellees herein, alleging mental incapacity on her part to make a valid conveyance of the property in question, and the exercise of undue influence on the part of her son in procuring the said conveyance to be made to him.

The cause was referred to master in chancery Leo J. Doyle, with directions to take and report the evidence, together with his conclusions thereon to the court. A hearing on the issues involved was had before the said master, whose term of office expired before he reported his conclusions thereon. Thereupon counsel for the respective parties to the litigation entered into a stipulation whereby the cause was re-referred to master in chancery James L. Howe, with directions to report his conclusions on the testimony "taken, transcribed and filed" before master Doyle. Thereupon the court entered an order [illegible] the cause to master Howe for hearing, which said order was "filed" by the stenographer for the respective parties. Thereupon master Howe filed his report on the testimony taken before said master Doyle, in which said report he finds duly [illegible] and, on the ground that the transcript of the evidence taken before Master

Doyle and incorporated in the report of Master Poage was not signed by the former and therefore could not be considered by the latter, under the foregoing stipulation. The court thereupon entered an order permitting Master Doyle to sign and certify the transcript of testimony heard by him and incorporated in Master Poage's report aforesaid. Afterwards, on motion of the appellant, the said master's report, based upon the aforesaid testimony, was set aside, and on motion of appellee the cause was re-referred to Master Poage, with directions to report the testimony of the respective parties back to the court, together with his conclusions of law and facts thereon. Thereafter the master filed a new report, which was withdrawn by order of the court on account of an error in procedure, and the cause again referred to the said master. The last order of reference enlarged the scope of the hearing, authorizing the master to consider not only the transcript of the testimony taken before Master Doyle, hereinabove referred to, but also any additional testimony introduced on behalf of the respective parties. Upon the final report of the master, based upon the testimony received pursuant to the last mentioned order of the court, the decree herein complained of was entered.

The only errors here relied upon relate to matters of procedure.

It is insisted by appellant, (1) that the transcript of testimony taken before Master Doyle and incorporated in the report of Master Poage was not signed by the former at or prior to the time the said stipulation was entered into, and that hence it could not properly be considered by Master Poage thereunder; and (2) that the court erred in permitting Master Doyle to sign the said transcript of testimony after the stipulation was entered into and his term of office had expired.

The stipulation, when viewed in the light of the

[illegible]

signed by the [illegible]

the latter, [illegible]

upon motors [illegible]

the transcript of [illegible]

Master Cogle's report [illegible]

appellant, [illegible]

testimony, [illegible]

was re-referred [illegible]

testimony of the [illegible]

with his usual [illegible]

master filed a [illegible]

court on [illegible]

referred to [illegible]

the work of [illegible]

only the [illegible]

interlocutory [illegible]

introduced on [illegible]

report of [illegible]

to the last [illegible]

complained of [illegible]

procedure.

[illegible]

of testimony [illegible]

report of master [illegible]

to the time [illegible]

hence it [illegible]

under: [illegible]

to sign the [illegible]

was entered [illegible]

The [illegible], when viewed in the [illegible]

fact that the solicitors for the repsective parties thereto approved the order of reference to Master Poage, and that the cause proceeded to a hearing before the said master, on the testimony in question, without objection, impels this court to the conclusion that the parties clearly intended that the testimony taken before Master Doyle should be considered by Master Poage for the purpose of reporting his conclusions thereon to the court; and when it developed that the said master's report was unfavorable to the complainant and the technical objection referred to was made thereto by her the court then permitted Master Doyle to perform what amounted to but a ministerial act, viz., to sign and certify to the correctness of the transcript of the testimony taken before him. This the court had the undoubted right to do. Coel v. Olos, 232 Ill. 142.

The point is also made, that the court erred in the entry of its last order of reference to Master Poage, for the reason that it augumented the scope of the original order of reference.

An original order of reference may be extended and enlarged by subsequent order of court. Federal Life Ins. Co. v. Looney, 180 Ill. App. 488.

It is finally insisted that the court erred in taxing Master Poage's fees at the sum of $479.22 as part of the costs in the case.

The master filed an itemized statement of his services and charges therefor, which was as follows:

"FEES FIXED BY STATUTE.

"I have read and listened to the reading by the attorneys for the respective parties 1725 folios of testimony for which I have charged 7½¢ per folio $129.37

"I have taken and reported 47 additional folios of testimony at 15¢ per folio, 27 of which were written up by the stenographer and 20 of which were documentary evidence 7.05

"The stenographer has taken and written up 1752 folios of testimony for which a charge of 15¢ per folio is a reasonable charge.....262.80

"FEES TO BE FIXED BY THE COURT.

"For obtaining files, docketing cause, setting cause for hearing, examination of pleadings, attendance upon the days when the cause was set for hearing and times reserved therefor, preparing conclusions of fact and of law and drawing report thereon, in all spending 16 hours' time which at $5.00 an hour amounts to..... 80.00

"Total..... .....$479.22"

It is contended that no charge could be made by Master Poage for 1725 folios of testimony taken before Master Doyle and availed of by Master Poage in the re-reference, pursuant to the aforesaid stipulation.

It has been held in such cases, that the statutory fees for taking and reporting the proof should be taxed in favor of the master, where the testimony heard before another master has been submitted to him by consent of the litigants and availed of by the master, in making up his report on the re-reference. Fitchburg Steam Engine Co. v. Potter, 211 Ill. 138.

It is also insisted that the last item in said statement, consisting of sixteen hours' time at $5.00 per hour, for various services including the preparation of conclusions of fact and of law, should not have been allowed over complainant's objection, without proof of the reasonableness of such charges.

While we are of the opinion that under the above circumstances this charge should not have been allowed by the court (Bentley v. Ross, 250 Ill. 182), yet inasmuch as the master was entitled to the statutory fee of fifteen cents per folio for testimony taken without further proof, and the total amount allowed him by the court was considerably less than the statutory allowance, it will be seen that a reversal on account of the erroneous allowance of said charge would serve no useful purpose.

Other points have been raised, which in our opinion,

"The stenographer [illegible] .....
folios of testimony for which [illegible] the
per folio is a reasonable [illegible] .....

"[illegible]

"For obtaining [illegible], [illegible], [illegible]
cause for hearing, [illegible]
attendance [illegible] days [illegible]
not for hearing [illegible]
preparing [illegible]
drawing [illegible]
hours' time [illegible] .....

"[illegible] .....

It is [illegible]

Page for [illegible] values of [illegible]
and evaluation of [illegible] to
the [illegible].

[illegible]
fees for [illegible]
of the [illegible]
been [illegible]
by the [illegible]

Literature [illegible]

It is [illegible]
concluding of [illegible]
service [illegible]
law, [illegible]
without [illegible]

[illegible]
[illegible]
(Bentley [illegible] 9). [illegible]
[illegible]
testimony [illegible]
allowed [illegible]
[illegible]
[illegible]
other points have been [illegible]

however, are not of sufficient moment to disturb the decree, and accordingly it will be affirmed.

AFFIRMED.

however, are not of sufficient moment to disturb the course, and accordingly it will be affirmed.

AFFIRMED.

532 - 23877

212 I.A. 653

ELGIN, JOILET & EASTERN RAILWAY COMPANY, a corporation,
Appellee,

vs.

C. P. TRIANDAFIL,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by one of the defendants, from a judgment for demurrage charges on certain cars used by defendants for the shipment of materials to Joilet, Illinois, over plaintiff's line of road.

By a written contract defendants agreed to construct a roundhouse for plaintiff at Joilet, Illinois. The contract provided, among other things, that plaintiff was to furnish defendants free transportation over its own lines for such men and materials as were necessary for the fulfillment of the work covered thereby.

The sole question here presented for determination is, whether or not the word "transportation" as used in said contract included the item of demurrage charges accruing on cars detained by defendants at their destination beyond a certain length of time after their arrival.

In C. & N. I. R. R. Co. v. Berwind White Coal Mining Co., 171 Ill. App. 302, this question was presented, and the court there held that demurrage charges "are no part of and are separate and distinct from transportation charges and do not arise, if at all, until the transportation has ended." To the same effect is P. C. C. & St. L. Ry. Co. v. Hedrick, 202 Ill. App. 48. While it may be true that for certain purposes the word "transportation" has been construed to include demurrage, yet there can be no doubt that the contract here presented did not contemplate anything beyond the bare transportation of the men and materials necessary for its fulfillment.

No. - 20277

212 I.A. 223

[illegible] JOHN & MACKEY
MACKEY COMPANY,
corporation,
Appellee,

vs.

C. P. [illegible],
Appellant.

[illegible]

[illegible]

This is a [illegible]
judgment [illegible]
for [illegible]
[illegible]'s [illegible]

[illegible]
[illegible]
[illegible]

Accordingly the judgment will be affirmed.

AFFIRMED.

556 - 23901

212 I.A. 653

GEORGE OUTMAN,
Appellee,

vs.

FRANK PARMELEE TRANSFER COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

Appellee, plaintiff below, recovered a judgment for $50.00 against appellant, for damages caused to his automobile by a collision with defendant's wagon, at the intersection of Jackson boulevard and Des Plaines street, in the city of Chicago.

Defendant complains of the ruling of the trial court in excluding the testimony of a police officer whereby defendant sought to prove the substance and effect of a certain police traffic rule alleged to have been in effect at the time of the accident. Without passing upon the admissibility of such a rule if properly presented, it is sufficient to say that the testimony offered was clearly inadmissible under the well recognized best evidence rule and it was therefore properly excluded.

It is also contended by defendant that the finding of the court is manifestly against the weight of the evidence.

Plaintiff testified that on the night of the accident he was proceeding in a westerly direction along Jackson boulevard, at the rate of about fifteen miles per hour; that as he approcahed Des Plaines street, he looked both to the north and south before crossing; that he heard no sound and did not see defendant's wagon until he was

556 - 23301

GEORGE GUTMAN,
Appellee,

vs.

FRANK PARMELEE TRANSFER COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL
OF CHICAGO.

SISIA, 653

MR. PRESIDING JUSTICE MCDONALD
DELIVERED THE OPINION OF THE COURT.

Appellee, plaintiff below, recovered a judgment for $50.00 against appellant, for damages caused to his automobile by a collision with defendant's wagon, at the intersection of Jackson boulevard and Des Plaines street, in the city of Chicago.

Defendant complains of the ruling of the trial court in excluding the testimony of a police officer whereby defendant sought to prove the existence and terms of a certain police traffic rule alleged to have been in effect at the time of the accident. Without ruling on the admissibility of such a rule if properly pleaded, it is sufficient to say that the testimony offered was clearly inadmissible under the well recognized best evidence rule and it was therefore properly excluded.

It is also contended by appellant that the finding of the court is manifestly against the weight of the evidence.

Plaintiff testified that on the night of the accident he was proceeding in a westerly direction along Jackson boulevard, at the rate of [illegible] miles per hour; that as he approached Des Plaines street, he looked both to the north and south before crossing; that he heard no sound and did not see defendant's wagon until he was

within about thirty feet thereof; that the said wagon was a one-horse vehicle, containing about twenty trunks and was proceeding north on Des Plaines street, at a fast gallop; that plaintiff made a turn to the right, in an endeavor to avoid a collision, and that the left front wheel of his automobile collided with the right front wheel of defendant's wagon, causing the damage complained of. The witness Bauer, who also testified on behalf of plaintiff, stated that he was driving an automobile east in Jackson boulevard at the time and place in question; that as he approached Des Plaines street he saw defendant's wagon proceeding north on Des Plaines street at a fast gallop; that the driver thereof did not stop at the south line of Jackson boulevard or give any warning of his approach; that he saw no light on defendant's wagon; that he (the witness) had difficulty in stopping his automobile to prevent defendant's wagon from running into it; that when defendant's wagon reached the north line of Jackson boulevard plaintiff attempted to turn north into Des Plaines street, and the collision occurred. The witness Brogan, testifying on behalf of the defendant, stated that he was in charge of defendant's said wagon at the time and place in question; that he was proceeding north in Des Plaines street after midnight, with about twenty-one trunks on said wagon; that the horse was going at a slow trot; that on reaching Jackson boulevard he looked east and west but did not stop; that he saw plaintiff's automobile about 150 feet east of Des Plaines street coming west, at the rate of about thirty-five miles per hour; that he thought he had as good right to street as plaintiff's automobile; that he drove across Jackson boulevard; that the collision occurred on the north side of Jackson boulevard; that he

within about thirty feet thereof; that the said wagon was a one-horse vehicle, containing about twenty trunks and was proceeding north on Des Plaines street, at a fast gallop; that plaintiff made a turn to the right, in an endeavor to avoid a collision, and that the left front wheel of his automobile collided with the right front wheel of defendant's wagon, causing the damage complained of. The witness Bauer, who also testified on behalf of plaintiff, stated that he was driving an automobile east in Jackson boulevard at the time and place in question; that as he approached Des Plaines street he saw defendant's wagon proceeding north on Des Plaines street at a fast gallop; that the driver thereof did not stop at the south line of Jackson boulevard or give any warning of his approach; that he saw no light on defendant's wagon; that he (the witness) had difficulty in stopping his automobile to prevent defendant's wagon from running into it; that when defendant's wagon reached the north line of Jackson boulevard plaintiff attempted to turn north into Des Plaines street, and the collision occurred. The witness Brogan, testifying on behalf of the defendant, stated that he was in charge of defendant's said wagon at the time and place in question; that he was proceeding north in Des Plaines street after midnight, with about twenty-one trunks on said wagon; that the horse was going at a slow trot; that on reaching Jackson boulevard he looked east and west but did not stop; that he saw plaintiff's automobile about 150 feet east of Des Plaines street coming west, at the rate of about thirty-five miles per hour; that he thought he had as good right to street as plaintiff's automobile; that he drove across Jackson boulevard; that the collision occurred on the north side of Jackson boulevard; that he

heard no warning of any kind from plaintiff's automobile.

The foregoing was all the testimony introduced which bore directly upon the manner in which the accident occurred; and from an examination thereof, we are not disposed to disturb the finding of the court. Accordingly the judgment will be affirmed.

AFFIRMED.

heard no warning of any kind from plaintiff's automobile.

The foregoing was all the testimony introduced which bore directly upon the manner in which the accident occurred; and from an examination thereof, we are not disposed to disturb the finding of the court. Accordingly the judgment will be affirmed.

AFFIRMED.

572 - 23917

212 I.A. 653

LIBBY, McNEILL & LIBBY,
a corporation,
Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This was a fourth class action in the Municipal Court of Chicago, brought by appellee against appellant, for damages resulting from deterioration to part of a shipment of meats from Chicago to Providence, Rhode Island, via appellant's lines. The court found for the plaintiff, assessing its damages in the sum of $216.33, and from the judgment entered thereon, defendant has prosecuted this appeal.

The principal contention made by defendant is, that plaintiff cannot recover because there is neither allegation nor proof in the record, of a compliance by plaintiff with the provision of the Uniform Bill of Lading (which constituted the agreement between the parties hereto), requiring notice of loss or damage within four months after delivery of the property to the consignee.

This being an action of the fourth class, under the practice obtaining in the Municipal Court of Chicago, it was not necessary for plaintiff to aver the giving of the said notice to defendant, in order to state a good cause of action. (Enberg v. City of Chicago, 271 Ill. 404.) Whether or not plaintiff gave the required notice

372 - 23917

212 I.A. 653

LIBBY, McNEILL & LIBBY,
a corporation,
Appellee,

vs.

GRAND TRUNK WESTERN RAILWAY
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MCSCHAIRD
DELIVERED THE OPINION OF THE COURT.

This was a fourth class action in the Municipal Court of Chicago, brought by appellee against appellant, for damages resulting from deterioration to part of a shipment of meats from Chicago to Providence, Rhode Island, via appellant's lines. The court found for the plaintiff, assessing its damages in the sum of $216.32, and from the judgment entered thereon, defendant has prosecuted this appeal.

The principal contention made by defendant is, that plaintiff cannot recover because there is neither allegation nor proof in the record, of a compliance by plaintiff with the provision of the Uniform Bill of Lading (which constituted the agreement between the parties hereto), requiring notice of loss or damage within four months after delivery of the property to the consignee.

This being an action of the fourth class, under the practice obtaining in the Municipal Court of Chicago, it was not necessary for plaintiff to aver the giving of the said notice to defendant, in order to state a good cause of action. (Ambrey v. City of Chicago, 273 Ill. 404.) Whether or not plaintiff gave the required notice

to defendant does not appear from the record, but in our opinion proof of the giving of such notice was indispensable to plaintiff's right of recovery. (Simpson v. Grand Trunk Western Ry. Co., Ill. App., First District, No. 23306 (not yet reported), and cases there cited.) Plaintiff having failed to make such proof, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

to defendant does not appear from the record, but in our opinion proof of the giving of such notice was indispensable to plaintiff's right of recovery. (Simpson v. Grand Trunk Western Ry. Co., 111. App., First District, No. 23306 (not yet reported), and cases there cited.) Plaintiff having failed to make such proof, the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

24349

212 I.A. 654

WEST DISINFECTING COMPANY,
a corporation,
Appellee,

vs.

HAROLD I. KOPPELMAN et al.,

On appeal of HAROLD I.
KOPPELMAN,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order overruling appellant's motion to dissolve a temporary injunction restraining appellant from (a) the further prosecution of an action at law pending in the Municipal Court of Chicago for commissions claimed by appellant from appellee under a certain contract of employment, (b) the transfer of any appliances, devices or patents acquired by appellant during his employment by appellee, (c) the use of any trade lists or trade information compiled or acquired by appellant during such period, and (d) interference with any employees of appellee, in the performance of their duties or the conduct of appellee's business.

The points relied upon by appellant for a reversal of the court's said order are: that the said contract of employment was illegal and hence unenforceable, because at the time it was entered into appellee was illegally doing business in the State of Illinois; and that the evidence introduced on the hearing to dissolve the injunction shows a want of equity in the bill of complaint.

The bill of complaint averred that for many years prior to 1913 appellant was in the employ of appellee as manager of its Chicago branch, which embraced a large territory in the

[illegible]

[illegible] DISTINGUISHING [illegible],
v. corporation.

[illegible]

[illegible]

[illegible]

RECORD 1. [illegible]

On appeal [illegible] RECORD 1.
AFFIRMED.

[illegible]

[illegible]

[illegible]

[illegible] motion to [illegible] from (a) [illegible] in the Municipal Court of [illegible] from [illegible] (b) the transfer of [illegible] by [illegible] during the [illegible] trade in [illegible] parties, and (d) [illegible] in the performance of [illegible] business.

[illegible] the court [illegible] was filed [illegible] of Illinois; [illegible] dismiss the [illegible] complaint.

[illegible] prior to [illegible] of the Chicago Board [illegible] in the

middle western states; that on June 17, 1912, appellant's contract of employment was renewed for a period of five years from January 1, 1913; that by the terms thereof appellant agreed not to become interested, either directly or indirectly, in any business which manufactured, sold or dealt in any products in competition with those manufactured by appellee, during the term of such employment; that appellant was not to engage in any other business except that of appellee's, and was to devote his entire time and attention thereto.

The bill further alleged that appellant's position with appellee under the said contract, was one of trust and confidence; that within the territorial limits of his branch, the secrets, policy and direction of appellee's business were intrusted to him; that interviews were had by many persons, such as inventors of appliances similar in character to those made by appellee, touching the company's business, and thereby confidential information intended for the company only came to appellant from time to time; that among others, Edmund Bruder (one of the defendants herein) tendered for sale to the appellee, through appellant, certain appliances of the character dealt in by appellee; that appellant concealed knowledge thereof from appellee and contrived with the said Bruder to develop the articles and the patents relating thereto, for appellant's own use and profit; and that while so employed by appellee, he devoted considerable time and attention to this secret enterprise, in violation of the provisions of his contract of employment.

Appellant filed a plea and an answer. The plea purported to refer to such transactions stated in the bill as took place prior to April 16, 1917, and as to those set forth substantially, that prior to said date appellee had not qualified or been licensed as a foreign corporation in accordance with the statute, and that hence no recovery could be had by complainant

middle western states; that on July 17, 1913, appellee's contract of employment was terminated [illegible] January 1, 1913; that by the terms [illegible] interested, either [illegible] manufactured, sold or [illegible] manufactured by appellee, [illegible]; that appellant was not [illegible] appellee's, and was in [illegible] interests.

The bill further [illegible] appellee under the [illegible]; that within the [illegible], policy and direction of appellee [illegible]; that interviews are had by [illegible] similar in [illegible] company's business, [illegible] the company only came [illegible] others, [illegible] to the appellee [illegible] obstructed [illegible] thereof from [illegible] the articles and [illegible] use and profit; [illegible] considerable [illegible] violation of the [illegible]

[illegible]

purported to [illegible] took place [illegible] substantially, [illegible] or been [illegible] statute, [illegible]

as to all transactions that took place prior to said date.

The answer filed by appellant purported to be addressed to such parts of the bill as related only to transactions which took place subsequently to April 16, 1917. It appears, however, that the denials therein contained were not limited to transactions occurring subsequently to said date, but covered the entire period of appellant's employment by appellee; and, without any limitation as to time, denied the charges against appellant of duplicity, misfeasance, etc.

It will be seen from the foregoing, that appellant's answer overlaps the plea in many respects; and appellee argues that because of such fact, the plea was waived.

A situation quite similar to the one here presented arose in Weber v. Fitzgerald, 281 Ill. 330, in which our Supreme Court held, p. 333:

> "If a plea is coupled with an answer to any part of the bill covered by the plea, and which, by the plea, the defendant consequently declines to answer, the plea will, upon argument, be overruled. * ** * The reason of this doctrine is, that pleas are to be put in ante litem contestatam, because they are pleas, only, why defendant should not answer, and, therefore, if he does answer to anything to which he may plead he overrules his plea, for the plea is only why he should not answer, and if he answers he waives the objection, and, of course, his plea."

So in the case at bar, we think appellant's answer was so coupled with the plea that the two virtually overlapped, and this notwithstanding the contrary recitals therein. In our opinion, therefore, appellant has waived the benefit of his said plea.

Aside from this question of pleading, we are of the opinion that appellant's position that appellee could not maintain this action for the reason assigned, is untenable. The record shows that many months prior to the filing of the bill of complaint appellee complied with the requirements of our statute with respect to foreign corporations. If at the time the bill of complaint was

as to all transactions th t took place [illegible]

[illegible] The answer [illegible]

to each party of the first [illegible]

took place subsequently [illegible]

that the [illegible] transactions were [illegible]

occurring subsequently [illegible]

of appellant's employment [illegible]

as to time, during t e [illegible]

misrepresentation, etc.

[illegible] It will be seen from [illegible] answer

overlaps the plea in [illegible]

of such fact, the plea [illegible]

[illegible] A citation quite at [illegible]

in Weber v. Bidwell, [illegible] 111, [illegible]

Held, p. 333:

"If a plea is [illegible]

part [illegible]

the plea, [illegible]

answer, [illegible]

* ** [illegible]

are [illegible]

are plaintiff, [illegible]

therefore, [illegible]

may plead [illegible]

why he [illegible]

the [illegible]

So in the [illegible]

with the [illegible]

standing the [illegible]

appellant [illegible]

[illegible]

opinion that appellant's [illegible]

this action [illegible]

show that many [illegible]

appellee complained [illegible]

to foreign corporations. [illegible]

filed appellee was entitled to the relief given, it is immaterial what the status of the parties was prior thereto. Goerz Am. Optical Co. v. J. & S., 175 Ill. App. 482.

The only remaining question is, whether or not the evidence warrants the relief granted.

The evidence consisted of affidavits and oral testimony. It tended to show that for a great many years prior to the filing of the bill of complaint herein, appellant was the Chicago manager of appellee and that he was its general agent for this territory; that the defendant, Bruder, called at appellee's Chicago office, where he met appellant, to whom he submitted a soap dispensing and also a toilet deodorizing device. Appellant insists that the devices submitted were rejected by him on behalf of appellee, because they were impracticable, and that he afterwards asked the said Bruder to develop certain ideas which he (appellant) had, pertaining to devices manufactured by appellee; and that the said Bruder did in fact invent such devices, which the appellant then claimed as his own. Bruder's testimony on this point was conflicting. On direct examination, when called as a witness on behalf of appellee, he stated that he invented the soap dispenser and deodorizing devices, but on cross examination he stated that the basic ideas of said appliances were appellant's.

The evidence further disclosed that for many months while appellant was yet in the employ of appellee, he made copies of appellee's trade lists, obviously for the purpose of making capital out of them when he severed connections with appellee. His action in this respect was clearly a violation of his duty as agent of appellee, and the fact that appellant averred that the said lists had been destroyed does not alter the situation. So long as appellant was in the employ of appellee there was at least an implied trust on his part, to promote and safeguard the interests of appellee. The secret development for his own use and benefit during the period of his

filed appellee's motion to [illegible] dismiss what the status of the petition was after [illegible]. [illegible] Am. [illegible] Co. v. [illegible] & [illegible], 175 [illegible] [illegible].

The only remaining question [illegible] warrants the voluntary [illegible].

The evidence [illegible] vital [illegible]. It tended to show that [illegible] the bill of complaint [illegible] appellee [illegible] the defendant, [illegible] not appellant, to [illegible] toilet deodorizing [illegible] mixture [illegible] improvements, and [illegible] valop certain [illegible] manufactured [illegible] invent such [illegible] Bruder's testimony [illegible] instead, when [illegible] that he [illegible] on cross-examination [illegible] appliances were [illegible].

The evidence [illegible] appellant was [illegible] appellee's trade [illegible] of them [illegible] this record [illegible] and the fact that [illegible] destroyed [illegible] the region of appellee [illegible] court, to promote [illegible] development [illegible].

employment, of new devices similar to those manufactured by appellee; the making of duplicate trade lists from appellee's records; the secret dealings with Bruder, - all these constituted flagrant breaches of the trust which appellant's employment implied. From a careful examination of the evidence, we are of the opinion that appellant's conduct in this respect did not comport with good faith.

We conclude, therefore, that appellee is entitled to the relief granted, and accordingly the order overruling appellant's said motion to dissolve the interlocutory injunction will be affirmed.

AFFIRMED.

employment, of new devices similar to those manufactured by appellee; the making of duplicate trade lists from appellee's records; the secret dealings with Kruger, - all these constituted flagrant breaches of the trust which appellant's employment implied. From a careful examination of the evidence, we are of the opinion that appellant's conduct in this respect did not comport with good faith.

We conclude, therefore, that appellee is entitled to the relief granted, and accordingly the order overruling appellant's said motion to dissolve the interlocutory injunction will be affirmed.

AFFIRMED.

38 - 23303

GEO. J. COCKE COMPANY, a corporation,
Appellee,

vs.

CORN PRODUCTS REFINING CO.,
Appellant.

212 I.A. 654

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellant (defendant in this suit) was engaged in the manufacture of various corn products, including brewers' refined grits, a starch product used in the manufacture of beer, several hundred bags of which it furnished for that purpose to appellee, (the plaintiff, which operated a brewery in Chicago) pursuant to its order therefor. Four hundred bags of these grits were delivered to plaintiff, July 2, 1910, and a few days later were used in nine successive brews, the first of which was started July 3, and the last July 11, and the others on intervening dates. Plaintiff contended that these grits communicated an offensive taste to the beer so brewed, due to their being impregnated with improper chemicals in the course of their manufacture, by reason of which it suffered damages to the extent of the reasonable value of beer destroyed, the expense incurred in the endeavor to cure the beer affected, and loss of trade and profits, amounting to $250,000.

The action is predicated upon a breach of warranty as to the merchantability and fitness of the grits for such purpose. Defendant filed the plea of general issue. The jury assessed plaintiff's damages at $212,500, and from the judgment entered thereon this appeal was taken.

In the view we take of the case it is unnecessary to review the evidence tending to show a breach of covenant and that the grits so furnished and used were unmerchantable and unfit

[illegible]

[illegible]

[illegible]

for such use, or the evidence as to any other material fact affecting the question of liability. These matters were properly left to the jury, and the evidence relating to them is such that we would not be disposed to disturb the verdict on the ground of insufficient proof to support the cause of action.

But as the assessment of damages was very large and based mainly on evidence introduced to show loss of trade and custom as a proximate result of the use of such ingredient, accuracy in the instructions on the subject was highly important. Two of them given at plaintiff's request, Nos. 1 and 14, are complained of in this connection, and it is urged that the jury were in effect led to believe therefrom that the plaintiff was entitled to recover consequential damages regardless of whether by exercise of due care it could have avoided them or minimized its loss. Instruction 1 directs a verdict of guilty on the jury's finding from the evidence certain facts and that plaintiff suffered damages therefrom. While no reference was made therein to the exercise of reasonable care by plaintiff to prevent loss, yet as the instruction did not attempt to state the measure of damages, and upon its hypotheses plaintiff was entitled to some damages, irrespective of any failure to avoid consequential damages, it could hardly be deemed erroneous.

But instruction 14 told the jury that if they found the defendant guilty, then in assessing plaintiff's damages they might take into account among other things the profits, if any, which plaintiff lost as a proximate result of the defaults of the defendant, so far as alleged and claimed by the declaration and as shown by the evidence. It contained no proviso that such loss of profits could not be recovered if the plaintiff's own wrong or want of due care contributed to bring about the result.

It is urged that if the jury found the defendant guilty under instruction 1, then they were authorized by instruction 14 to give plaintiff consequential damages to its trade and custom even though plaintiff by the exercise of ordinary care could have

prevented such a result. In this connection it is also urged that the trial court erred in refusing two instructions tendered by defendant, telling the jury in effect that if they found from the evidence that plaintiff put defective beer on the market, after it knew it had an off-taste, plaintiff could not recover consequential damages to trade and custom therefrom. We need not discuss the alleged error in refusing to give these instructions attempting to embody defendant's theory as to the measure of damages. It is enough to say that if there was any evidence on which to predicate the claim of a want of due diligence and reasonable care on the part of plaintiff in placing such beer on the market or with its customers after it discovered the offensive taste, then instruction 14 ignored a vital matter for the jury's consideration in determining the consequential damages.

That there was some evidence tending to support appellant's contention of the failure to exercise reasonable care in this respect, cannot be questioned. The first delivery of the beer so affected was made on Saturday, July 16, and on that day, after such delivery, the attention of plaintiff's brew master was called to the presence of the offensive taste in the beer. No more beer was delivered that day, and an expert was sent for who suggested treating the beer with a substance known as "Wyandotte," which was put in the beer so affected on Sunday. There was evidence, however, tending to show that some of the beer so treated was put out on the market during that week after complaints with regard thereto came in from plaintiff's customers.

Appellee meets the criticism of the instruction and reference to this evidence, not by questioning the soundness of appellant's theory so much as the basis for it in the evidence, and discusses it from the point of view that, as plaintiff was assured by experts that the beer after treatment was marketable, it was warranted in relying on their opinion and putting out the beer so treated, and that conditions were such it had no other

prevented such a result. In this connection [illegible]
that the trial court [illegible] and
by defendant, telling the jury [illegible] from
the evidence that [illegible] after
it knew it had an off-[illegible] consequential
damage to crops on [illegible] the
alleged error in [illegible] relating to
another defendant's [illegible] in order
to say that if [illegible] the claim
of a want of due care [illegible] of plaintiff
in placing [illegible] after it
discovered the [illegible] a vital
matter for the jury's [illegible] consequential
damage.

[illegible] contention [illegible] plaintiff's
contention [illegible] this purpose,
cannot be questioned. [illegible] affected was
made on [illegible] the
attention of [illegible] of
the offending [illegible]
day, and so [illegible] door with a
substitute [illegible] affected
on Sunday. [illegible] cause of
the door so [illegible] week after
complaints [illegible]

[illegible]
reference [illegible]
apparently [illegible]
and it issues it [illegible]
answered by [illegible] possible,
it was [illegible] the
door be treated, and in [illegible] other

alternative except resort to a course that might ruin its business and enlarge its damages. Such an argument might well be addressed to the weight of the evidence but does not meet appellant's contention as to the rule of damages and its right to invoke it. If appellant's theory with regard to plaintiff's duty to exercise such care to prevent further damages is well founded, as we think, and there was any evidence upon which to predicate it, as is the fact, then the instruction was erroneous in omitting a precise embodying such theory. That the theory is well founded hardly calls for discussion. (Draper v. Hoyt, 66 Barbour, 145; Hitchcock v. Hunt, 26 Conn. 343; Schlenter v. Sherman Bros., 169 Ill. App. 386; Rezey v. Colt Co., 94 N. Y. Supp. 59; 1 Sedgwick on Damages, 9th Ed. Sec. 202.)

Nor need we review the evidence at length upon which appellant predicates its claim. While the Wyandotte treatment improved the taste of the beer it is clear from the testimony of several of plaintiff's own witnesses that it did not eliminate the offensive taste, and that complaints continued to be made against it and were brought to complainant's attention before it made other deliveries of the beer so treated. And while the jury, taking all circumstances together, may nevertheless have believed that plaintiff exercised reasonable care to avoid the consequences that ensued, and we might not disturb their finding were that the sole question before us, still there being evidence on which they might reach a different conclusion appellant had a right to present its theory based thereon, and it was error to ignore it in instructing the jury on the measure of damages.

Error is also urged in allowing evidence of the amount of plaintiff's profits for a period of years both before and after the occurrence in question. While it is difficult to determine the precise limits that should be put on evidence of that character, - each particular case standing upon its own peculiar facts - such evidence showed practically a yearly increase in plaintiff's

its

business from its foundation until the occurrence in question when there was a sudden, marked decrease in the quantity of sales, which never to the time of the trial reached the maximum attained in the year previous to said occurrence. In 1909 the sales amounted to 112,000 barrels, and in 1910 before said occurrence there was an increase of 2,000 barrels over the sales in the corresponding period of the previous year, but after July 16, 1910, the sales fell off about 100 barrels a day. The evidence showed sales of 92,000 barrels in 1910, 77,000 in 1911, 78,000 in 1912, 92,000 in 1913, 103,000 in 1914 and 89,000 in 1915, the year before the trial. With the exception of the showing of the last year we think such evidence was competent and properly received. But in view of the errors referred to in said instruction the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible] from its foundation until the conversion in [illegible] when there was a sudden, marked decrease in the quantity of [illegible] sales, which never to the time of the [illegible] attained in the year previous to said [illegible]. In 1[illegible] the sales amounted to 112,000 barrels, and in [illegible], said occurrence there was an increase of [illegible] over the sales in the corresponding period of the previous year, but from July 16, 1919, the sales fell off about [illegible] per cent. The evidence showed sales of 99,000 barrels in 1[illegible], [illegible] in 1911, [illegible] in 1912, 92,000 in 1913, 109,000 in 1[illegible] and 90,000 in 1915, the year before the trial. With the exception of the [illegible] of the last [illegible] we think such evidence was [illegible] and [illegible] only [illegible]. But in view of the errors referred to in this [illegible] the judgment must be reversed and the [illegible] [illegible].

[illegible] C.

333 - 23678

212 I.A. 654

CHICAGO RECORD HERALD COMPANY,
a corporation,
Appellee,

vs.

HENRY KADIN & COMPANY,
corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This case was tried without a jury. The finding and judgment were for plaintiff (appellee). The statement of claim was for advertising pursuant to an alleged contract, a copy of which was attached thereto as Exhibit A, and for previous advertising at the same rate mentioned in the contract, which it was alleged was agreed to at the time of making said contract. A statement of the dates, insertions and charges, was attached to the statement of claim as a part thereof and marked "Exhibit B". The amount of debits, less the credits, thus shown was $169.30, for which judgment was given.

The alleged contract bears date June 8th, 1915. The items of charges are dated from October, 1914, to February, 1916. There are seventeen of them, eleven being for insertions since the date of said contract. Three of the previous items appear to have been paid, leaving three for $27 unpaid.

We think appellant's contention that the court's finding and judgment are not supported by proof is well taken. Under the issues plaintiff was required to prove that the alleged contract of June 8th, 1915, was authorized,

333 - 25678

212 I.A. 554

CHICAGO RECORD HERALD COMPANY, a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
HENRY KAHN & COMPANY, corporation, Appellant.	

MR. JUSTICE FRANCIS ALBRY DELIVERED THE OPINION OF THE COURT.

This case was tried without a jury. The finding and judgment were for plaintiff (appellee). The statement of claim was for advertising furnished to an alleged contract, a copy of which was attached thereto as Exhibit A, and for previous advertising at the same rate mentioned in the contract, which it was alleged was agreed to at the time of making said contract. A statement of the dates, insertions and charges, was attached to the statement of claim as a part thereof and marked "Exhibit B". The amount of debits, less the credits, thus shown was $1,683.30, for which judgment was given.

The alleged contract bears date June 8th, 1915.

The items of charges are dated from October, 1914, to February, 1916. There are seventeen of them, eleven being for insertions since the date of said contract. Three of the previous items appear to have been paid, leaving three for $27 unpaid.

We think appellant's contention that the court's finding and judgment are not supported by proof is well taken. Under the issues plaintiff was required to prove that the alleged contract of June 8th, 1915, was authorized,

and an agreement to pay for the previous advertising at the rate mentioned in said contract. There was no adequate proof of either.

The alleged contract was in the form of an order to insert a minimum of four agate lines for at least thirty days at a cost of 15 cents per line each day and to continue the same until notified in writing to the contrary. It was signed in the name of the defendant by its bookkeeper or cashier, whose only proven authority was a direction from defendant's president, who attended to these matters, to "fix up" or "make out the ad." which a representative for plaintiff was then soliciting. Under this limited direction the bookkeeper executed the order aforesaid, which the president never saw nor had knowledge of. Most of the charges subsequent to that time were for insertions pursuant thereto. It appeared that orders for advertising theretofore, and even afterwards, were usually given by appellant's president, either over the telephone or to a solicitor who presented an order for his "O.K." Plaintiff itself introduced one of these orders dated August 17, 1915, which, though specifically "O.K'd." by said president for $1.65, is included in the items sued for under said contract. Such order was seemingly unnecessary if both parties recognized the existence of such a contract.

Under such circumstances we cannot regard the mere direction "to fix up an ad." as an authorization to a person not empowered or accustomed to make contracts for the corporation, to sign a written contract of such a character binding the corporation for an indefinite period, especially in view of the practice both before and after that time for the president to give specific orders, as

and an agreement to pay for the previous advertising at the rate mentioned in said contract. There are no accounts proof of either.

The alleged contract was in the form of an order to insert a minimum of four white lines for at least thirty days at a cost of 15 cents per line each day and to continue the same until notified in writing to the contrary. It was signed in the name of the defendant by the bookkeeper or cashier, whose only proven authority is a direction from defendant's president, who attended to these matters, to "fix up" or "make out the ad." which is representative for plaintiff was then soliciting. Under this limited direction the bookkeeper executed the order sheet in, - but the president never saw nor had knowledge of. Most of the charges subsequent to 1 x time were for insertions pursuant thereto. It appeared that orders for advertising therefore, and even afterward, were usually given by appellant's president, either over the telephone or to a solicitor who presented an order for his "O.K." Plaintiff itself introduced one of these orders dated August 17, 1915, which, though specifically "".K'd." by said president for $1.65, is included in the items used to make said contract. Such order was seemingly unnecessary if both parties recognized the existence of such a contract.

Under such circumstances we cannot regard the mere direction "to fix up an ad." as an authorization to a person not empowered or even issued to make contracts for the corporation, to sign a written contract of such a character binding the corporation for an indefinite period, especially in view of the practice both before and after that time for the president to give specific orders, as

aforesaid, for a limited number of lines and insertions.

Not only was there no adequate proof of authority to execute such a contract, but there was no competent evidence from which an assent thereto, or knowledge of any other advertising than that specifically authorized by the company's president, could be inferred. Without other specific proof of an order different from those previously given by the president, which were expressly limited as to time, we think the direction given would be limited to the form of the advertisement, and that there was a failure to prove authority to make a contract of the character sued on. There was some attempt to prove, but no adequate proof made of the mailing of bills for such advertising.

Nor was there any proof whatever tending to show that there was any agreement to pay for the previous advertising at the rate mentioned in said contract.

The statement of claim was predicated upon a written contract and an express verbal promise. Neither was proven. The evidence was insufficient, therefore, to sustain the statement of claim.

What we have said is without prejudice to the right of appellee to bring another action to recover for any unpaid advertising it has done for defendant on any other contract, express or implied, than the one sued on. But recovery therefor cannot be had on this statement of claim under the proof submitted.

The judgment will accordingly be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

aforesaid, for a limited number of lines [illegible] insertions.

Not only was there no adequate proof of authority to execute such a contract, but there was no competent evidence from which an agreement therein, or waiving or any other advertising than that specifically authorized by the company's president, could be inferred. Without other specific proof of an order different from those previously given by the president, which were exp[illegible] limited as to time, we think the direction given no[illegible] limited to the form of the advertisement, and [illegible] to prove authority to make [illegible] charter [illegible] on. There was some attempt to prove, but [illegible] proof [illegible] of the mailing of bills [illegible] claim.

Nor was there any proof [illegible] to show that there was any [illegible] to pay [illegible] previous advertising [illegible] in said company.

The statement of clerk [illegible] written contract and an express [illegible] was proven. The evidence was [illegible] to sustain the plaintiff's claim.

What we have said is without [illegible] right of appellee to bring [illegible] any unpaid advertising [illegible] other contract, express or implied, [illegible] But recovery therefor cannot be had on this statement of claim under the proof submitted.

The judgment will accordingly be reversed with a finding of fact.

[illegible] - WILL [illegible] OF FACT.

FINDING OF FACT.

We find that the appellant corporation, Henry K. Kadin & Co., never authorized the execution of the contract in its name referred to in the statement of claim on which this action was brought, and that there was no express agreement by said company to pay 15 cents per agate line for advertising done for appellant by appellee, Chicago Record Herald Co., previous to June 8th, 1915.

FINDING OF FACT.

We find that the plaintiff corporation, Henry K. Rudin & Co., never authorized the execution of the contract in its name referred to in the statement of claim on which this action is brought, and that there was no express agreement by the company to pay its certain per agate line for advertising done for appellant by appellee, Chicago Record Herald Co., previous to June 8th, 1915.

463 - 23808

ADAM ANDRZEWSKI et al.
Administrators etc.,
Appellees,

vs.

CHICAGO RAILWAYS COMPANY
et al., On Appeal of
Chicago Railways Company,
Appellant.

212 I.A. 654

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This was an action for damages on account of the death of appellee's intestate, caused by a collision between a car of the Chicago Railways Company and a truck of the Star Motor Delivery Co. who were made defendants. The damages were assessed at $8,250. Judgment was entered against both. Each appealed. This appeal is by the former.

It is first urged that the damages are excessive.

The deceased was a girl eight and a half years old. Her next of kin were her parents, two brothers and two sisters. She was the next youngest child. The evidence presented no data from which to compute damages except her age, that she was healthy, that she attended a public school two years, and -- as testified by her mother through an interpreter -- that she could read and write English "very well". It must be conceded that from these evidenciary facts alone no very intelligent opinion could be formed as to the child's capacity or characteristics, or as to what her parents might reasonably expect in a pecuniary way from the continuance of her life. While a presumption of law obtains in their favor there must also be a reasonable

ADAM ANDRZEJOWSKI et al.
Administrators etc.,
Appellees,

vs.

CHICAGO RAILWAYS COMPANY
et al., On Appeal of
Chicago Railways Company,
Appellant.

MR. JUSTICE DAMMRS DELIVERED THE OPINION OF THE COURT.

This was an action for damages on account of the death of appellee's intestate, caused by a collision between a car of the Chicago Railways Company and a truck of the Star Motor Delivery Co., who were defendants. The damages were assessed at $4,000. Judgment was entered against both. Each appealed. This appeal is by the former.

It is first urged that the damages are excessive. The deceased was a girl eight and a half years old. Her next of kin were her parents, a brother and two sisters. She was the youngest child. The evidence presented no data from which to compute damages except her age, that she was healthy, that she attended a public school two years, and -- [illegible] by her mother through an interpreter -- that [illegible] and write English "very well". It must be conceded that from these evidentiary facts alone no very intelligent opinion could be formed as to the child's capacity or characteristics, or as to what her parents might reasonably expect in a pecuniary way from the continuance of her life. While a preponderance of law obtains in their favor there must also be a reasonable

basis in the evidence for the assessment of damages. In Fowler v. C. & E. I. R. R. Co., 234 Ill. 619, an instruction on the measure of damages was condemned because the jury were left to fix the damages, if any, "without requiring them to limit the assessment to the amount of actual pecuniary damages sustained, as shown by the evidence." And in Lichtenstein v. Fish Furniture Co., 272 id. 191, the court said: "The jury, in determining the amount of damage to the next of kin, were to judge from the evidence what such next of kin might have reasonably expected in a pecuniary way, from the continuance of the life of the deceased, and it would not be correct to say that the amount was to be measured by the pecuniary benefit which they might derive from the deceased." (199). In other words, the jury's verdict must rest in such a case on the "facts proven in connection with their own knowledge and experience in relation to matters of common observation." (B. & O. S. W. Ry. Co. v. Then, 159 id. 535, and cases cited.)

It is true, as said in O. & M. Ry. Co. v. Wangelin, 152 id. 138, "the question is, in its nature, incapable of exact determination". And as also said in the Then case, quoting Chicago & Alton Ry. Co., 43 id. 338, "The amount of the verdict must be largely left (within the limits of the statute) to the discretion of the jury." But neither expression was intended, as indicated by the Fowler and Lichtenstein cases, to dispense with evidence upon which the jury can base its determination and exercise a sound discretion.

Appellant cites many like cases in which appellate courts of this and other states have required a

basis in the evidence for the assessment of damages. In Fowler v. C. & N. W. R. R. Co., 34 Ill. 49, an instruction on the measure of damages was condemned because the jury were left to fix the damages, if any, "without requiring them to limit the assessment to the amount of actual pecuniary damages sustained, as shown by the evidence." And in Lichtenstein v. Chicago Furniture Co., 177 Ill. 121, the court said: "The jury, in determining the amount of damage to the next of kin, were to judge from the evidence what such next of kin might have reasonably expected in a pecuniary way, from the continuance of the life of the deceased, and it would not be correct to say that the amount was to be measured by the pecuniary benefit which they might derive from the deceased." (129). In other words, the jury's verdict must rest in such a case on the facts proven in connection with their own knowledge and experience in relation to matters of common observation." (B. & O. R. R. Co. v. Tyson, 188 Ill. 545, and cases cited.)

It is true, as said in C. & N. W. R. R. v. Wakefield, 132 Ill. 138, "the question is, in its nature, incapable of exact determination". And also said in the Lynn case, quoting Chicago & Alton R. R. Co. v. Gregory, 58 Ill. 226, "The amount of the verdict must be left to the jury (within the limits of the statute) to the discretion of the jury." But neither expression was intended, as indicated by the Fowler and Lichtenstein cases, to dispense with evidence upon which the jury can base its determination and exercise a sound discretion.

Appellant cites many other cases in which appellate courts of this and other states have required a

remittitur, and appellee cites several like cases where the courts have refused to interfere with seemingly large verdicts. An extended reference to them is unnecessary. Generally speaking, they present varying conditions and distinguishing features of fact, to review which would be of little value in the instant case, for we think it can be stated as a general deduction from the pertinent decisions that the discretion which the jury may exercise in determining the pecuniary damages sustained by the next of kin from the death of a child of tender years must not only be a sound discretion but find a reasonable basis in the evidence with which the jury may take into consideration "their own knowledge and experience in relation to matters of common observation."

Appellant calls attention to the several elements of proof enumerated in the Fowler case (where the deceased child was twelve years old) as competent to be proven as a basis for computing pecuniary loss sustained by the next of kin. While all of such elements might not be provable where the child was much younger, we think that this case was capable of more evidence bearing on damages than was adduced, and that the evidence presented is too meager to support such a large verdict. In view of the laws of this state restricting employment of children under fourteen years and requiring a child up to the age of sixteen to attend school for at least six months each year, the pecuniary value of a girl's services to her parents during her minority would not ordinarily be much above the cost of her support and

remittitur, and appellee cites several like cases where the courts have refused to interfere with seemingly large verdicts. An extended reference to them is unnecessary. Generally speaking, they present varying conditions and distinguishing features of fact, to review which would be of little value in the instant case, for we think it can be stated as a general deduction from the pertinent decisions that the discretion which the jury may exercise in determining the pecuniary damages sustained by the next of kin from the death of a child of tender years must not only be a sound discretion but find a reasonable basis in the evidence with which the jury may take into consideration "their own knowledge and experience in relation to matters of common observation."

Appellant calls attention to the several elements of proof enumerated in the Yoder case (where the deceased child was twelve years old) as competent to be proven as a basis for computing pecuniary loss sustained by the next of kin. While all of such elements might not be provable where the child was much younger, we think that this case was capable of more evidence bearing on damages than was adduced, and the evidence presented is too meager to support such a large verdict. In view of the laws of this state restricting employment of children under fourteen years and requiring a child up to the age of sixteen to attend school for at least six months each year, the pecuniary value of a child's services to her parents during her minority would not ordinarily be much above the cost of her support and

maintenance for that period. For reasonable expectancy of pecuniary aid after that time the record furnishes very little ground for sound deduction. It contains nothing as to the age, occupation, station or physical condition of her parents to throw light on the prospect of their looking to her in the future for pecuniary aid, and nothing as to the nature or characteristics of the deceased child to indicate her future ability or disposition to render it. And yet the verdict is almost the maximum allowed by law for the most extreme case as, for instance, where a widow and young children are left without support by death of the head of the family. In this state of the record we think the damages were excessive and cannot avoid the conclusion that the jury were actuated by other considerations than the reasonable expectations furnished by the evidence.

We do not think any other point urged calls for a reversal of the judgment. It is claimed that the declaration did not state a cause of action because it failed to allege freedom from negligence by the child's parents. It averred that the deceased was killed while standing upon a public sidewalk and while in the exercise of ordinary care for her own safety, as a result of the negligence of both defendants, whereby the car and truck collided in the street, causing a keg of nails to be thrown from the truck against the child. We think such averments support the implication that the child was old enough to exercise care for her own safety, that she was where she, with or without her parents, had a right to be, that the negligence was wholly that of defendants, and therefore none was imputable to the parents. The same objection was made in

maintenance for that period. For reasonable economy of pecuniary aid after that time the record furnishes very little ground for sound deduction. It contains nothing as to the age, occupation, station or physical condition of her parents to throw light on the prospects of their looking to her in the future for assistance, and nothing as to the nature or characteristics of the deceased child to indicate her future ability or disposition to render it. And yet the verdict is almost the maximum allowed by law for the most extreme case so, for instance, where a widow and young children are left without support by death of the head of the family. In this state of the record we think the jurors were excessive and cannot avoid the conclusion that the jury were actuated by some considerations from the reasonable support [illegible] by the evidence.

We do not think any other point [illegible] for a reversal of the judgment. It is claimed that the declaration did not state a cause of action because it failed to allege freedom from negligence on the [illegible] parents. It appears that [illegible] standing upon a [illegible] in the street [illegible] of ordinary care [illegible] negligence of both defendants, [illegible] collided in the street, causing [illegible] from the truck [illegible] support the inference that [illegible] exercise care for her own safety, [illegible] with or without her parents [illegible] negligence was about their [illegible] was imputable to the parents. The case of [illegible] was made in

I. C. R. R. Co. v. Warriner, 229 id. 91, where the court held that from similar allegations it was inferable that the accident was not due to want of care of the parents, and also that the alleged defect was cured by verdict.

One instruction on damages is complained of. It does not pretend to furnish a rule for measuring damages which was given in other instructions, but merely advises the jury that they were not confined in assessing them, to the value of the services of deceased until she would have arrived at the age of eighteen years, but might consider the continuance of her life and benefits to be derived therefrom afterward. Passing on the same instruction in the Lichtenstein case, the court thought it would not be misunderstood.

Complaint is also made of refusing an instruction to the effect that one mode of impeaching a witness is by showing that he has made "different and contrary statements on the same point on former occasions." A careful analysis of the evidence reveals no substantial contradiction, or such variation in the witness' statements as might reasonably affect the jury's conclusions and call for the application of such an instruction.

Other minor points are made but are not of sufficient merit to require specific attention. In no event could they be deemed reversible error.

We think there should be a remittitur to $5,000. Even that sum with accumulating interest up to the time deceased would have attained her majority, would give a principal, whose annual interest, in our opinion, would, in most cases, exceed the yearly savings of the average

I. K. L. R. 26. v. Warriner, 288 id. 1, where the court held that from similar allegations it [illegible] that the accident was not due to [illegible] of the business, and also that the alleged defect [illegible] proximate.

The instruction on this [illegible] it does not pretend to [illegible] which was given in other [illegible] the jury that they were not [illegible] to the value of the services [illegible] have arrived at the age of [illegible] years, but [illegible] sider the continuance of her life and [illegible] derived therefrom afterward. [illegible] in the Lichtenstein case, [illegible] be misunderstood.

Complaint is also made of [illegible] to the effect that one [illegible] showing that he has [illegible] on the same point or [illegible] of the evidence reveals no [illegible] variation in the [illegible] effect the jury's [illegible] of such an instruction.

Other [illegible] sufficient [illegible] event could they be [illegible]

We think [illegible] Even that sum with account [illegible] deceased would have [illegible] principal, whose annual [illegible] in most cases, exceed the yearly savings of the average

female wage earner from which she could be expected to furnish pecuniary aid. But we recognize the difficulty in such a case in estimating damages otherwise than approximately.

There is nothing in the record to indicate that the deceased would have furnished her parents, as to whom alone the presumption of pecuniary loss exists - for there was no proof, and hardly could be, of course, that the deceased had been habitually making financial contributions to her collateral kindred - any greater pecuniary aid than would be realized from a judgment for that amount. Hence, if there be a remittitur to $5,000 within ten days from the filing of this opinion, a judgment for that amount will be affirmed, otherwise the judgment will be reversed with a remanding order.

AFFIRMED ON REMITTITUR.

female wage earner from which she could be expected to furnish pecuniary aid. But we recognize the difficulty in such a case in estimating damages otherwise than approximately.

There is nothing in the record to indicate that the deceased would have furnished her parents, as to whom alone the presumption of pecuniary loss exists - for there was no proof, and hardly could be, of course, that the deceased had been habitually making financial contributions to her collateral kinsred - any greater pecuniary aid than would be realized from a judgment for that amount. Hence, if there be a remittitur to $5,000 within ten days from the filing of this opinion, a judgment for that amount will be affirmed, otherwise the judgment will be reversed with a remanding order.

AFFIRMED OR REMITTITUR.

338 - 23683

212 I.A. 655

ANDREW ANDRZEWSKI et al.,
Appellees,

vs.

STAR MOTOR DELIVERY COMPANY,
a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is by the Star Motor Delivery Co. from a judgment against it and the Chicago Railways Company, for $8,250 as damages on account of the death of appellee's intestate, a minor, eight and a half years old, caused by a collision of appellant's truck with a Chicago Railways car.

We have already considered the appeal of the latter in general number 23,808, and filed an opinion therein, and as we could not affirm as to one and reverse as to the other defendant we at the same time considered the points raised on this appeal. As after consideration of the points raised on both appeals we have decided to affirm the judgment in case of a remittitur down to $5,000, it follows that we find no reversible error that cannot be cured by remittitur.

Two of the points urged for reversal here were considered in the opinion referred to, namely, the question of excessive damages, and alleged error in giving an instruction which was complained of on the same ground without avail in Lichtenstein v. Fish Furniture Co., 272 Ill. 191. What we have said in the other opinion on these points need not be repeated here.

212 I.A. 655

ANDREW ANDRZEJEWSKI et al.,
appellees,

vs.

STAR MOTOR DELIVERY COMPANY,
a corporation,
appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE EARNES DELIVERED THE OPINION OF THE COURT:

This appeal is by the Star Motor Delivery Co. from a judgment against it and the Chicago Railways Company, for $8,250 as damages on account of the death of appellee's intestate, a minor, eight and a half years old, caused by a collision of appellant's truck with a Chicago Railways car.

We have already considered the appeal of the latter in general number [illegible], and filed an opinion therein, and as we could not affirm as to one and reverse as to the other defendant we at the same time considered the points raised on this appeal. After consideration of the points raised on both records we are [illegible] to affirm the judgment in [illegible] of [illegible] $5,000, it follows that we find no reversible error but cannot [illegible] cured by remittitur.

Two of the points urged for reversal to be were considered in the opinion referred to, namely, the exists of excessive damages, and illegal error in giving an instruction which was complained of on the same ground without avail in Lichtenstein v. Lake Terminals Co., 274 Ill. 191. What we have said in the other opinion on these points need not be repeated here.

The points urged on this appeal not considered in the other opinion relate to the giving of certain instructions and the refusal to give others. We do not deem the action of the court with respect thereto as erroneous.

The complaint against the given instructions is that they authorized the verdict of guilty against appellant on grounds of negligence not charged in the declaration, namely, in one of them, for violation of the statute limiting the speed of motor vehicles in closely built up sections of the city, and, in the other, for violation of a city ordinance as to the passing of vehicles. There was evidence tending to show a violation of both the statute and the ordinance, and each instruction complained of told the jury that if the particular violation was the sole cause of the action then the Chicago Railways Co. was to be found not guilty. Neither instruction directed a verdict against appellant upon any hypothesis.

It can hardly be questioned that the Railways Co., was entitled to such an instruction. The motorman had a right to assume, until the contrary appeared, that the driver would observe both the statute and the ordinance, and if he was misled by palpable violation of either, and such violation was the sole cause of the accident, the Railways Co., would not be guilty. Inasmuch, too, as the jury were told by other instructions that appellant could not be found guilty except upon proof of the specific negligence charged in the declaration, and the instructions in question did not authorize a verdict for plaintiff, we think appellant has no good ground for complaint.

Three of appellant's refused instructions were

The points urged on this appeal not considered in the other opinion relate to the giving of certain instructions and the refusal of two others. We do not deem the action of the court with respect thereto as erroneous.

The complaint merely [illegible] the given instructions is that they authorized the [illegible] to find against appellant on grounds of negligence not charged in the declaration, namely, in one of them, for violation of the statute limiting the speed of motor vehicles in closely built up sections of the city, and, in the other, for violation of a city ordinance as to the passing of vehicles. There was evidence tending to show a violation of both the statute and the ordinance, and each instruction complained of told the jury that if the particular violation was the sole cause of the action then the Chicago Railways Co. was to be found not guilty. Neither instruction directed a verdict against appellant upon any hypothesis.

It [illegible] the Railways Co., was entitled to such an instruction. The motorman had a right to assume, [illegible] contrary appeared, that the driver would [illegible] the ordinance, and if he was [illegible] of either, such violation [illegible] the cause of the accident, the Railways Co., would not be liable. Inasmuch, too, as the jury were told by other instructions that appellant could not be found guilty [illegible] of the specific negligence charged in the declaration, and the instructions in question did not authorize a verdict for plaintiff, we think appellant has no good ground for complaint.

Three of appellant's refused instructions were

to the effect that in determining its case the jury had no right to consider any evidence offered and received on behalf of the other defendant. No pertinent authority is cited to support this proposition. The liability in such a case is several and the jury may find either or both parties guilty, and is required to consider all of the evidence pertinent to the issues. The evidence which tends to exculpate one may tend to inculpate the other. If such evidence, however, is prejudicial and not applicable to the other the jury may be so instructed. We do not think the jury was misled by the instructions upon the issues and what could be properly considered in determining them, or that there was any error in the refusing or modifying of any instructions.

In case of a remittitur by appellee down to $5,000 within ten days herefrom the judgment will be affirmed, otherwise reversed with a remanding order.

AFFIRMED ON REMITTITUR.

to the effect that in determining the case the jury had no right to consider any evidence offered and received on behalf of the other defendant. No pertinent authority is cited to support this proposition. The liability in such a case is several and the jury may find either or both parties guilty, and is required to consider all of the evidence pertinent to the issues. The evidence which tends to exculpate one may tend to incriminate the other. If such evidence, however, is prejudicial and not applicable to the other the jury may be so instructed. We do not think the jury was misled by the instruction upon the issues and what could be properly considered in determining them, or that there was any error in the refusing or modifying of any instructions.

In case of a remittitur the appellee then is $5,000 within ten days hereafter the judgment will be affirmed, otherwise reversed with a remanding order.

AFFIRMED OR REMITTITUR.

345 - 23690

212 I.A. 655

THE D. HILL NURSERY COMPANY,
Appellee,

vs.

OSCAR METZ,
Appellant.

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This suit was for $72.15, the price of certain coniferous plants sold by appellee to appellant. It was heard without a jury. The finding and judgment were for plaintiff. The only point raised on the appeal is as to the weight of the evidence, which was conflicting both as to the character of the plants ordered and the condition in which they were received by appellant. No question of law is presented. As we cannot say that the evidence as abstracted does not furnish sufficient ground for the court's finding of fact and the judgment entered thereon it would subserve no useful purpose to detail the points of conflict. We think itenough to say that the apparently worthless condition in which the goods were received by defendant, and on which he bases his defense, can reasonably be attributed to the unusual delay of about two weeks in their transportation by freight. But defendant ordered them so sent and paid the freight bill, and as there was sufficient evidence from which the court might find that the contract was for delivery to the carrier as defendant's agent, and that the condition of the goods was due to the latter's neglect, we would not be justified in disturbing the judgment.

AFFIRMED.

345 - 93690

THE D. HILL NURSERY COMPANY,
Appellee,

vs.

OSCAR MEIZ,
Appellant.

A Peal from
Municipal Court
of Chicago.

MR. JUSTICE [illegible] DELIVERED THE OPINION.

This suit was for $72.15, the price of certain contraceptive plants sold by appellee to appellant. It was heard without a jury. The finding and judgment were for plaintiff. The only point raised on the appeal is as to the weight of the evidence, which was conflicting both as to the character of the plants ordered and the condition in which they were received by the vendee. No question of law is presented. We cannot say that the evidence in abstracted does not furnish substantial ground for the court's finding of fact and the judgment entered thereon it would subserve no useful purpose to det[illegible] the points of conflict. We think it enough to say that the apparently worthless condition in which the goods were received by defendant, and on which he bases his defense, [illegible] be attributed to the unusual delay [illegible] in their transportation by freight. [illegible] so sent and paid the freight [illegible] evidence from which the jury [illegible] was for delivery to [illegible], [illegible] that the condition of the goods was due [illegible] neglect, we would not be justified in setting aside the judgment.

AFFIRMED.

372 - 23717

212 I.A. 655

WEST ENGLEWOOD CONSTRUCTION & SUPPLY COMPANY, a corporation, Appellee,

vs.

JACOB G. LEVINSON, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for plaintiff in a suit for the contract price for constructing a sidewalk adjoining appellant's premises in Chicago. A jury was waived.

The sole defense was that the sidewalk was built a few inches within the line fixed by city ordinances prescribing a penalty for violation in this respect to which appellant might be subject. While it appeared that because of conflicting surveys in that portion of the city the lines could not be definitely established, yet it also appeared that the sidewalk was laid on lines designated by the city's authorized agent, and also in line with a previously laid sidewalk in the same block, as, under the ordinance, could be done in certain circumstances regardless of such fixed line, and that the work was duly approved and accepted by the city.

The theory of the defense was that on grounds of public policy appellant is not obliged to pay the contract price if the construction is not in conformity with the requirements of the city ordinances. While there were no propositions of law or rulings that presented

372 - 22717

WEST WOODWARD CONSTRUCTION & SUPPLY COMPANY, a corporation,
Appellee,

vs.

JACOB G. LEVINSON,
Appellant.

MR. JUSTICE ANDERSON DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for plaintiff in a suit for the contract price for constructing a sidewalk adjoining appellant's premises in Chicago. A jury was waived.

The sole defense was that the sidewalk was built a few inches within the line fixed by city ordinances prescribing a penalty for violation in this respect to which appellant might be subject. While it appeared that because of conflicting surveys in that portion of the city the lines could not be definitely established, yet it also appeared that the sidewalk was laid on lines designated by the city's authorized agent, and also that in lieu of a properly laid sidewalk in the same block, so, under the ordinance, could be done in certain circumstances regardless of such fixed line, [illegible] a permit and [illegible] by the city.

The theory of the defense was that on grounds of public policy appellant is not liable to pay the contract price if the construction is not in conformity with the requirements of the city ordinances. While there were no propositions of law or findings that presented

21211.055

FILED FROM
MUNICIPAL COURT
OF CHICAGO.

such a question for review, we doubt whether defendant can take a position which the city itself would seemingly, after having induced and directed construction on said lines, be estopped from taking if it attempted to enforce such penalty. (See opinion of this court, not yet published, in Gen. No. 23,120, People etc. v. Thompson et al., filed March 18, 1918.)

Appellant set up and abandoned more substantial defenses and we do not think the facts as presented are such as to relieve him from liability to pay the price he agreed to pay for the sidewalk.

AFFIRMED.

such a question for review, we doubt whether defendant can take a position which the jury trial would seemingly, after having induced and directed counsel [illegible] tion on said issues, be stopped from taking if it succeeded in entirely such penalty. (See opinion of [illegible] Court, not yet published, in Gen. No. [illegible], [illegible] v. Thompson et al., filed March [illegible], 1918.)

Appellees set up two counterclaims, more substantial defenses and we do not think the Court in [illegible] such as to relieve him from liability to pay the price he agreed to pay for the sidewalk.

AFFIRMED.

391 - 23736

FRANCES BARROWS,
Appellee,

vs.

THE CITY OF CHICAGO,
Appellant.

212 I.A. 655

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for damages for personal injuries received in an accident on one of appellant's streets, a highway, near its northern and beyond its paved limits. The only point raised is that the notice given of the accident is too indefinite as to its place to comply with the statute and was such as misled appellant in the preparation of its defense.

The essential part of the description reads: "On Milwaukee avenue at or near a culvert under said highway, said culvert being about 200 feet more or less northwest of the frame dwelling house then occupied by one George Vandenberg, located on the northeast side of said Milwaukee avenue and known and described as No. 6401 Milwaukee avenue, said house standing at or near the intersection of said Milwaukee avenue with 64th avenue * * * * City of Chicago."

Milwaukee avenue runs northwest from its intersection with 64th avenue. There were two culverts in that vicinity. The distances and directions to them from the Vandenberg house, which was located as stated in the notice, were only approximately testified to. The evidence tended to show that the two culverts were about 150 to 200 feet apart and that the northern one,

391 - 22736

MARCUS BARROWS,
Appellee,

vs.

THE CITY OF CHICAGO,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for damages for personal injuries received in an accident on one of appellant's streets, a highway, near its northern and beyond its paved limits. The only point raised is that the notice given of the accident is too indefinite as to its place to comply with the statute and was misled appellant in the preparation of its defense.

The essential part of the description reads:

"On Milwaukee avenue at or near a crossing made by said highway, and where [illegible] northwest of the [illegible] one George Vandenberg, located on the northeast side of said Milwaukee avenue and known and described as No. [illegible] Milwaukee avenue, said house standing [illegible] intersection of said Milwaukee avenue [illegible] * * * City of Chicago."

Milwaukee avenue runs [illegible] intersection with [illegible] avenue. [illegible] in that vicinity. [illegible] from the Vandenberg house, [illegible] in the notice, were only [illegible]. The evidence tended to show that the two [illegible] about 150 to 300 feet apart and that the northern one,

where the accident happened, was about due west or slightly northwest of, and 200 feet from, said house and that there was no other culvert within a mile north thereof. It follows that it was the only culvert that could reasonably be regarded as the one referred to in the notice. The southern one did not correspond to the description. In view of the surroundings, distances and directions disclosed by the evidence, we think the notice designated the northern culvert with sufficient accuracy to enable appellant to locate it and not mistake one further south for the place of the accident.

While appellant in support of its motion for a new trial filed an affidavit purporting to give exact and different measurements, we must be governed by the evidence at the trial.

The judgment will be affirmed.

AFFIRMED.

where the accident happened, was about due west or slightly northwest of, and 200 feet from, said house and that there was no other culvert within a mile north thereof. It follows that it was the only culvert that could reasonably be regarded as the one referred to in the notice. The southern one did not correspond to the description. In view of the surroundings, distances and directions disclosed by the evidence, we think the notice designated the northern culvert with sufficient accuracy to enable appellant to locate it and not mistake one further south for the place of the accident.

While appellant in support of its motion for a new trial filed an affidavit purporting to give exact and different measurements, we must be governed by the evidence at the trial.

The judgment will be affirmed.

AFFIRMED.

425 - 23770

JOHN S. HART,
Appellee,

vs.

ELIZABETH I. OLIVER,
Appellant.

212 I.A. 655

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is a creditor's bill proceeding based on section 49, chapter 22 of our Revised Statutes, which provides that:

> "Whenever an execution shall have been issued against the property of a defendant, on a judgment at law or equity, and shall have been returned unsatisfied in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and other person, to compel the discovery of any property or thing in action, belonging to the defendant," etc.

Complainant was the judgment creditor, and sued out the execution. Defendant, Albert J. Oliver, was one of the joint judgment debtors.

The bill of complaint contains the usual allegations and seeks among other things to reach the alleged interest of said judgment debtor in real estate, the title to which was held in the name of defendant, Elizabeth I. Oliver, formerly his wife. The case took the usual procedure of a reference to the master, who reported as his conclusion from the facts found that the conveyance of said real estate to said Elizabeth I. Oliver was fraudulent as to complainant and should be set aside as to him or his assignees, and that the judgment recovered by said Hart should be decreed a valid and subsisting lien upon said real estate subject to a certain encumbrance. The report was confirmed and a decree was entered accordingly.

It appeared at the hearing before the master that after the beginning of the suit said judgment had been assigned to Fred H. Atwood and Frank B. Pease, counsellors for complainant,

and thereupon defendant, Elizabeth I. Oliver, declined to proceed with her defense, contending that the suit had abated by reason of said assignment and the failure of the assignees to file a supplemental bill in the nature of an original bill of revivor, and she moved for a rule on said assignees to file such a supplemental bill. A hearing of the motion was postponed until the coming in of the master's report, when it was overruled. In the meantime, at the suggestion of the chancellor, said assignees entered their appearance in the cause and themselves as security for costs in the same, and consented to be bound by the proceedings therein, both those taken and to be had, and any decree that might be entered. A motion to strike this instrument from the files was denied.

The main point raised on this appeal is whether on such a showing of the record it was error for the court to allow the proceeding to continue in complainant's name. Whatever may be the rule of equity practice in other cases we think there is sufficient authority for holding that by reason of the express provision of the section of the statute on which the bill was founded that "the party suing out such execution" may file the bill, the proceeding may properly be continued in his name. It was expressly held by this court in a similar case (Merchants Bldg. Improvement Co. v. Chicago Exchange Bldg. Co., 108 Ill. App. 54) that a defendant is not entitled to have such a bill dismissed because not brought in the names of the parties who it alleges are the owners of the judgment. In Walker v. Montgomery, 236 Ill. 244, where it appeared in a similar proceeding that the complainant who filed the bill as administrator of an estate had been discharged as such administrator, the court said "the judgments were rendered in favor of the complainant as administrator and the executions were sued out in his name in that capacity. * * * The complainant had a right to prosecute the creditor's bill, as he did, regardless of any

[illegible]

in

[illegible]

question as to whom he should account." It was also said there that the defendant, Dove, (who stood in the same relation to that suit as does defendant Elizabeth I. Oliver to the case at bar by holding the title to the property sought to be reached) "was not deprived of any rights and the judgments settled the question of the capacity in which recovery was had." No question is made here as to the merits of the controversy, any defense to which was still open to appellant, Elizabeth I. Oliver, whether the proceedings continued under the original bill or a supplemental bill in the nature of a bill of revivor.

It is unnecessary to consider the propriety of the assignees' appearance in the record as it in no way affects the validity of the decree. Any danger of being called on again to pay the judgment debt is removed by a provision in the decree for the payment of the proceeds of sale, after certain deductions for fees etc., to the clerk of the court to be applied to the satisfaction of the judgment. The decree will be affirmed.

AFFIRMED.

question as to some of such [illegible]
that the [illegible]
that [illegible]
but by [illegible]
"was not [illegible]
question [illegible]
is made [illegible]
which [illegible]
the proceeding [illegible]
bill in [illegible]

It is [illegible]
assignees' [illegible]
validity of [illegible]
pay the [illegible]
the [illegible]
for fees [illegible]
matter [illegible]

448 - 23793

JOSEPH FARIAS,
Appellee,

vs.

HERMAN SCHUETTLER et al.,
Appellants.

212 I.A. 656

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a final decree permanently enjoining the Superintendent of Police of the City of Chicago, and certain of its subordinate police officers, their successors and all persons under their charge and directions, from interfering or intermeddling, without "legal process and warrant of law," or "legal right or legal writ," with the hotel business of complainant at a certain location in said city, and from entering and trespassing upon the premises, and from doing certain specified acts tending to interfere with said business. While the case came up on a motion for a preliminary injunction, by agreement of the parties the cause was heard in open court on oral evidence, and the court deeming that no more evidence would or could be introduced by either party, entered a decree making a complete finding of facts and enjoining appellants as aforesaid.

While complainant produced evidence of a plausible character in the first instance to show he conducted a mere hotel, yet when it is read between the lines after production of evidence adduced by defendants we are impressed that complainant had no standing in a court of equity and good conscience, but came into it with unclean hands. Evidence was introduced by appellants tending strongly to show that said hotel was conducted as a house of assignation, and it was unrefuted that it was patronized by prostitutes and others for immoral purposes, that persons were arrested there for resorting to such hotel for such

JOSEPH RAINE,
Appellant,

vs.

HERMAN SUHR, [illegible] et al.,
Respondents.

Mr. JUSTICE [illegible]

[illegible] is an [illegible]
enjoining [illegible]
and certain [illegible]
and all persons [illegible]
or interest [illegible]
"legal [illegible]
at a certain location [illegible]
upon the premises, [illegible]
interfere with [illegible]
for a period [illegible]
was heard [illegible]
no more [illegible]
entered [illegible]
appellant [illegible]

[illegible]
character in [illegible]
hotel, [illegible]
evidence [illegible]
had no [illegible]
come into [illegible]
appellants [illegible]
as a [illegible]
petitioned by [illegible]
persons were [illegible]

purposes, some of whom were convicted, and one of whom was permitted by complainant, after conviction, to remain in said hotel, and another of whom solicited patrons for the house for immoral purposes while running an elevator therein.

Appellee conceded that "had the evidence below showed that complainant was conducting a disreputable house or a house of ill-fame, the decree should most assuredly have been reversed, for he then would have no standing in a court of equity." We cannot read this record without feeling that complainant was seeking through specious appearances of conducting a legitimate hotel to tie the hands of the police against interfering with an immoral and illegitimate business conducted therein.

We might add, too, that we are of the opinion that if defendants exceeded their authority and were in fact trespassers, complainant had an adequate remedy at law. The decree will be reversed with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED.

purposes, some of whom were convicted, and one of whom was permitted by complainant, after conviction, to remain in said hotel, and another of whom solicited patrons for the house for immoral purposes while running an elevator therein.

Appellee conceded that "had the evidence below showed that complainant was conducting a disreputable house or a house of ill-fame, the decree should most assuredly have been reversed, for he then would have no standing in a court of equity." We cannot read this record without feeling that complainant was seeking through opprobrious appearances of conducting a legitimate hotel to rid the brade of the police against interfering with an immoral and illegitimate business conducted therein.

We might add, too, that we are of the opinion that if defendants exceeded their authority and were guilty of trespassers, complainant had an adequate remedy at law. The decree will be reversed with directions to dismiss the bill for want of equity.

REVERSED AND REMANDED.

511 - 23856

212 I.A. 656

W. A. CASE & SON MANUFACTURING COMPANY,
Appellee,

vs.

C. ERWIN NORMAN, trading etc. et al.,
Appellants.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee is a manufacturer of boilers, radiators and heating supplies. Appellant Norman is a local jobber in that line who bought of appellee and sold to contractors, among them appellant Brown. Either in payment or as security for the indebtedness incurred in certain of such transactions Brown gave his two notes to Norman, who, in turn, endorsed and transmitted them to appellant, and the latter brought this suit upon them against Brown as maker and Norman as endorser. The court directed a verdict for plaintiff, which is the sole matter complained of on this appeal.

Under the general issue appellants sought to show defects in said goods by way of recoupment, basing their claim on an implied warranty that the articles were made in a workmanlike manner, of good material and were adapted to the purposes for which they are to be used. So far as Brown is concerned this defense could not be made, there being no privity of contract between him and appellee. Demands to be set off must be mutual and between the same parties. (Buchanan v. Meisser, 105 Ill. 638.) The evidence showed that Brown's contract was with Norman and not with appellee.

311 - 2633

312 I.A. 656

T. A. CAGE & CO. LAMPS.STOVES COMPANY, appellee,	
vs.	
C. EMMIE BOWMAN, trading etc. et al., appellants.	COUNTY COURT OF COOK COUNTY.

Mr. Justice [illegible] delivered the opinion of the court.

Appellee is a manufacturer of heaters, radiators and heating supplies. Appellant Bowman is a local jobber in that line who by dint of agreeing not to compete among them selves. Either in payment or as security for the indebtedness incurred in certain of such transactions Green gave his two notes to Bowman, who, in turn, endorsed and transmitted them to appellant, and the latter brought this suit on them against Green as maker and Bowman as endorser. The court directed a verdict for plaintiff, which is the sole matter complained of on this appeal.

Under the general issue [illegible] to show defects in said notes [illegible] their claim on [illegible] made in a commercial way, or [illegible] adapted [illegible] far as [illegible] there being no validity [illegible] appellee. Demands to [illegible] between the same parties. [illegible] v. [illegible] The evidence showed that [illegible] and not with appellee.

If the defense was open to Norman the evidence failed to show that he sustained other than mere nominal damages by reason of the breach of implied warranty. As said in Wadhams v. Swan, 109 Ill. 46, where defendant sought to recoup for breach of contract -

> "While * * * there can be no question as to appellant's right to recoup in this case, to the extent warranted by the proofs, yet it is manifest the allowance of merely nominal damages being all that he is entitled to, would make no appreciable difference in the amount of the judgment. A cent the one way or the other would certainly make no practical difference, and the maxim, de minimis non curat lex, applies."

Brown sought to show certain damages occasioned by the cost of remedying alleged defects. But it appeared from the evidence that Norman gave special notice in his catalogue of the goods that "Norman boilers are guaranteed only to the extent of furnishing new castings for any found to be defective in manufacture," and that Norman replaced certain castings, but the value thereof or damage to Norman is not made to appear in the evidence. Assuming his right to recoup, there was no evidence upon which to predicate a definite amount for recoupment and therefore nothing, except the fact of nominal damages, for the jury to consider. Under such a state of the record we shall affirm the judgment.

AFFIRMED.

If the defendant was open to disclosure the evidence failed to show that he was injured other than some nominal damages by reason of the breach of implied warranty. As said in Hudkins v. Ryan, 109 Ill. 46, where different results to reasons for breach of warranty -

> "While * * * there can be no question as to appellant's right to recover, in this case, to the extent warranted by the proofs, yet it is manifest the allowance of merely nominal damages being all that he is entitled to, will make no appreciable difference in the amount of his judgment. A court the one way or the other would certainly make no practical difference, and the maxim, De minimis non curat lex, applies."

Brown sought to show loss in damages occasioned by the cost of remedying alleged defects. But it appeared from the evidence that Norman gave special notice in his catalogue of the goods that "Norman Boilers are guaranteed only to the extent of furnishing new castings for any found to be defective in manufacture," and that Norman replaced certain castings, but [illegible] breach or damage to Norman is not made to appear in the evidence. Assuming his right to recover, there can be no doubt [illegible] predicate a definite amount for recovery and therefore nothing, except the fact of nominal damage, for the jury to consider. Hence such a state of the [illegible] affirm the judgment.

[illegible].

517 -, 23862

212 I.A. 656

COLUMBIAN BANK NOTE COMPANY,
a corporation,
Appellee,

vs.

ROBERT J. KERR,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal rests on questions of fact. Only two were raised by the pleadings, namely, (1) whether the contract of the plaintiff company for the engraving of stock certificates by it was made with defendant (appellant) personally or as agent of the corporation named in the certificates he ordered; and (2) whether there was a stated account between plaintiff and defendant, the action for the price of the certificates being based both on the contract and a stated account.

The jury found for plaintiff, and after reading the abstract we think the verdict is supported by a preponderance of the evidence. While there were only two witnesses to the making of the oral contract, plaintiff's manager and the defendant, who disagreed as to the exact language employed, yet defendant's claim that he was acting as agent for the corporation cannot be justified in the face of his admissions tending to support the fact that the company had not been organized or chartered at the time he gave the order. His claim that he was acting as its agent is not tenable under such a state of facts, for the company was not in existence. He may have represented its promoters or

21 Cal. 356

SUP. -, 23862

COLUMBIA BANK NOTE COMPANY, a corporation,
Appellee,

vs.

ROBERT L. [illegible],
Appellant.

APPEAL FROM [illegible]

MR. JUSTICE [illegible] delivered the following opinion of the court.

This appeal rests on [illegible] two were raised by [illegible] the contract of the [illegible] of stock certificates [illegible] (appellant) personally [illegible] named in the certificate [illegible] there was a [illegible] defendant, the [illegible] being [illegible]

The [illegible] reading the [illegible] by a [illegible] only the [illegible] plaintiff [illegible] to the [illegible] that he [illegible] be justified in [illegible] support the [illegible] or charged [illegible] that he was [illegible] upon a state of [illegible] existence. He may [illegible]

organizers, but he did not purport to. The jury, therefore, was justified in accepting plaintiff's version of the transaction which rendered defendant personally liable.

Besides, defendant also admitted that the bills for such engraving were mailed to him in his name and received by him without protest. The bills thus presented were for $300, the price agreed upon unless defendant was disappointed in the prospective company, in which case the price was to be $275, which was the amount of the verdict and judgment. Plaintiff did not express disappointment until long after the bills were rendered. Under such circumstances the fact that they were rendered for $300 did not make them any less a stated account. But the evidence sustains defendant's liability on the contract regardless of the question of a stated account.

AFFIRMED.

organizers, but he did not permit so. The jury, therefore, was justified in accepting plaintiff's version of the transaction which renders defendant personally liable.

Besides, defendant also deducted the bills for such engraving were mailed to him in the same manner received by him without protest. The bills thus presented were for $800, the price agreed upon. Unless defendant disappointed in the product delivered, in which case the price was to be $275, which was the amount of the verdict and judgment. Plaintiff did not receive the engravings until long after the bills were paid. Under such circumstances the fact that they were worthless, if they did not make them any less a [illegible], it has evidence sustains defendant's liability on the contract regardless of the question of [illegible].

AFFIRMED.

529 - 23874

212 I.A. 656

RILEY CUT STONE COMPANY,
a corporation,
Appellee,

vs.

CECIL E. BRYAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee, an endorsee, brought this suit against the Storm Lake Mausoleum Co., as the maker, and appellant C. E. Bryan as endorser of two promissory notes, payable to the order of said Bryan, and endorsed by him. Said company was dismissed out of the case, and on a trial without a jury, the finding and judgment were for plaintiff against defendant Bryan. The only defense set up in the affidavit of merits was an agreement to the effect that appellant was not to pay the notes he so endorsed except from collections on certain contracts. While such a contemporaneous oral agreement was disputed, nevertheless such a defense to a note absolute on its face is not available. (See Schultz v. Meyer, 181 Ill. App. 335, and cases there cited.

The other matters insisted upon and argued were not put in issue by the pleadings and hence, even if otherwise tenable, are not open for consideration. The judgment will be affirmed.

AFFIRMED.

329 - 23874

312 I.A. 556

HILLEY CUT STONE COMPANY,
a corporation,
appellee,

vs.

CECIL H. BRYAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE HAMMER DELIVERED THE OPINION OF THE COURT.

Appellee, an endoree, brought this suit against the Storm Lake Manufacturing Co., as the maker, and appellant C. H. Bryan as endorser of two promissory notes, payable to the order of said Bryan, and endorsed by him. Said company was dismissed out of the case, and on a trial without a jury, the finding and judgment were for plaintiff against defendant Bryan. The only defense set up in the affidavit of merits was an agreement to the effect that appellant was not to pay the notes he endorsed except from collections on certain contracts. While such a contemporaneous oral agreement was disputed, nevertheless such a defense to a note absolute on its face is not available. (See Comstock v. Meyer, 181 Ill. 45, and cases there cited.

The other matters insisted upon in argument were not put in issue by the pleadings and hence, even if otherwise tenable, are not open for consideration. The judgment will be affirmed.

AFFIRMED.

554 - 23899

212 I.A. 656

SABATH & WEISSKOPF COMPANY,
a corporation,
Appellee,

vs.

MRS. S. M. GOLDSTINE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Appellee's suit was for a balance claimed to be due for whiskey sold to appellant, and for $100 loaned to her at her special instance and request. In her affidavit of defense she denied being a party to any such transactions. Evidence was heard tending to support both contentions, but at the close of all the evidence the court instructed the jury to render a verdict for appellee. The ground for such an instruction does not appear in the record but it is stated in the arguments that it was based upon the ground that as the license for the saloon where the whiskey was ordered and delivered was in appellant's name, and the $100 was loaned to pay for the license, she was estopped by the ordinance providing for such license from denying that she was the owner of the saloon and liable for such loan and for goods delivered there on such orders, whether made by her or not. The ordinance referred to not being in the record we have no judicial knowledge of it. But whatever it was we cannot assume that the ordinance attempted to establish a rule of evidence that would preclude defendant from showing who were the actual parties to the alleged loan and orders, - the real matters put in issue by the pleadings, upon which there was an unquestioned conflict of evidence, requiring submission of the case to the jury. For error in directing a verdict the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

554 - 83899

21 21 I.A. 556

SAHATH & WEISBROKE COMPANY, a corporation, appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
MRS. S. M. GOLDSTEIN, appellant.	

MR. JUSTICE HAINES DELIVERED THE OPINION OF THE COURT.

Appellee's suit was for a balance claimed to be due for whiskey sold to appellant, and for gifts loaned to her at her special instance and request. In her affidavit of defense she denied being a party to any such transactions. Evidence was heard tending to support both contentions, but at the close of all the evidence the court instructed the jury to render a verdict for appellee. The ground for such an instruction does not appear in the record but it is stated in the arguments that it was based upon the ground that as the license for the saloon where the whiskey was ordered and delivered was in appellant's name, and the $100 was loaned to pay for the license, she was estopped by the ordinance providing for such license from denying that she was the owner of the saloon and liable for such loan and for goods delivered there on such orders, whether made by her or not. The ordinance referred to not being in the record we have no judicial knowledge of it. But whatever it was we cannot assume that the ordinance attempted to establish a rule of evidence that would preclude defendant from showing who were the actual parties to the alleged loan and orders, - the real matters put in issue by the pleadings, upon which there was an unnecessarily conflict of evidence, requisition submission of the case to the jury. For error in directing a verdict the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

566 - 23911

212 I.A. 657

WEYAUWEGO MILLING COMPANY,
Appellee,

vs.

G. W. CRAMER,
Appellant.

Appeal from
Municipal Court
of Chicago.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff (appellee) sold defendant (appellant) 200 barrels of rye flour at $5.40 per barrel. The original order was modified so as to give defendant the right of inspection, which he exercised shortly after delivery. Claiming therefrom that the flour was "old, had bugs and worms and no strength", he notified plaintiff to remove it. Plaintiff, after repeated requests so to do, removed the flour, resold it for less than the contract price, brought this suit to recover the difference and certain expenses, and obtained the judgment appealed from.

The flour was sold by sample and plaintiff's proof, if not when it first rested, did, when finally submitted, tend to show the flour delivered corresponded to the sample. Thereupon defendant submitted his proof, thereby waiving his previous motion for a directed verdict. His proof tended to show that the flour was old and contained worms, bugs and weevils. Plaintiff rebutted with evidence tending to show not only that the flour had been milled less than four months when delivered -- not long enough under existing circumstances, as shown by the

812 I.A. 657

500 - 25311

WEYAUWEGO MILLING COMPANY, Appellee,	
vs.	Appeal from Municipal Court of Chicago.
O. W. CRAMER, Appellant.	

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff (appellee) sold defendant (appellant) 200 barrels of rye flour at $5.40 per barrel. The original order was modified so as to give defendant the right of inspection, which he exercised shortly after delivery. Claiming therefrom that the flour was "old, had bugs and worms and no strength", he notified plaintiff to remove it. Plaintiff, after repeated requests so to do, removed the flour, resold it for less than the contract price, brought this suit to recover the difference and certain expenses, and obtained the judgment appealed from.

The flour was sold by sample and plaintiff's proof, if not more, if first rested, did, when finally submitted, tend to show the flour delivered corresponded to the sample. Thereupon defendant moved [illegible] his proof, thereby waiving his previous motion for a directed verdict. His proof tended to show that the flour was old and contained worms, bugs and weevils. Plaintiff rebutted with evidence tending to show not only that the flour had been milled less than four months when delivered -- too long enough under existing circumstances, as shown by the

evidence, for the development of such conditions -- but that examinations and inspections of the flour after delivery to defendant showed that it was in good condition and not so infected.

There was thus presented a question of fact as to the condition and quality of the flour, which required submission of the case to the jury and which they decided in plaintiff's favor. Appellant's motion for a directed verdict made at the close of all the evidence was therefore properly overruled. As it is not specifically argued that the verdict was against the weight of the evidence we need not analyze it, deeming it such, however, as would not warrant interference with the jury's conclusion.

Complaint is made of the prejudicial effect of certain evidence that was stricken out because not connected, relating to other samples of flour, and also of certain evidence received tending to show a delay of delivery at defendant's instance and at a time when the market price of flour was declining. We think neither matter sufficiently prejudicial to warrant a reversal.

The only other error urged is the giving of the following instruction:

> "The court instructs the jury that the defendant has set up that the flour delivered to him was wormy and not fit for use, and that the burden of proof is upon the defendant to establish these facts by a preponderance of the evidence, and if you find that the preponderance of the evidence as to these facts is in favor of the plaintiff, or is evenly balanced, then your verdict should be for the plaintiff."

evidence, for the development of such conditions -- that that examinations and inspections of the flour after delivery to defendant showed it to be in good condition and not so infected.

There was thus presented a question of fact as to the condition and quality of the flour, which remained submission of the case to the jury and which they decided in plaintiff's favor. Appellant's motion for a directed verdict made at the close of all the evidence was therefore properly overruled. As it is not specifically argued that the verdict was against the weight of the evidence we need not analyze it, bearing in mind, however, as we did not warrant interference with the jury's conclusion.

Complaint is made of the plaintiff's witnesses of certain evidence that was irrelevant or remote or connected, relating to other samples of flour, and also of certain evidence received tending to show a delay of delivery at defendant's instance until a time when the market price of flour was declining. We think neither matter sufficiently prejudicial to warrant a reversal.

The only other error urged is the giving of the following instructions:

> "The court instructs the jury that the defendant has met up that the flour really was to him was worthless and not fit for use, and that the burden of proof is upon the plaintiff to establish those facts by a preponderance of the evidence, and if you find that the preponderance of the evidence is in these facts in favor of the plaintiff, or it is evenly balanced, then your verdict should be for the plaintiff."

We do not think it was error to give the instruction. Defendant relied on an affirmative defense, namely, that the flour delivered was, as stated in his affidavit of defense, "wormy and full of worm casts". The burden of proving such defense rested on defendant. The burden of proving the contrary did not rest on the plaintiff. The plaintiff of course was bound to prove its case by a preponderance of evidence, including delivery of flour of the quality it contracted to sell, and the record shows that it assumed such burden. It was not bound to prove the negative of an affirmative defense by a preponderance of evidence. (Richelieu Hotel Co. v. Mil. Encampment Co., 140 Ill. 248; Egbers v. Egbers, 177 Ill. 82.) We think the judgment should be affirmed.

AFFIRMED.

We do not think it was error to give the instruction. Defendant relies on an affirmative defense, namely, that the flour delivered was, as stated in his affidavit of defense, "weevy and full of worm casts". The burden of proving such defense rested on defendant. The burden of proving the contrary did not rest on the plaintiff. The plaintiff of course was bound to prove its case by a preponderance of evidence, including delivery of flour of the quality it contracted to sell, and the record shows that it assumed such burden. It was not bound to prove the negative of an affirmative defense by a preponderance of evidence. (Riverside Hotel Co. v. Mil. Engineers Co., 140 Ill. 248; Agnew v. Rabare, 177 Ill. 82.) We think the judgment should be affirmed.

AFFIRMED.

257 - 23602

212 I.A. 657

WASHINGTON J. WOODWORTH,
Appellee,

vs.

CHARLES R. BAUERDORF,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On March 9, 1916, appellee Woodworth sued Fr. Beck & Co., a corporation in the Municipal Court of Chicago for moneys due for salary and commission.

On the same day the necessary affidavit was made and an attachment in aid issued. The summons was served on a number of the debtors as garnishees. These garnishees answered, admitting their indebtedness to the defendant, but alleging that prior to the service of the writ the accounts had been assigned to appellant, Charles R. Bauerdorf and the garnishees notified thereof.

The defendant was a New York corporation. On the day the suit was begun in Chicago it was duly adjudged a bankrupt by the courts of New York.

On motion of the garnishees, appellant and the trustee in bankruptcy were made parties to the suit. The trustee in bankruptcy did not appear or make any claim to the funds.

Appellant Bauerdorf filed an intervening petition in which he claimed the accounts due from the respective garnishees by assignment to him in writing for a valuable consideration on March 2, 1916, as collateral security for loans in the sum of $51,000.

The plaintiff in the attachment suit answered

287 - 53602

WASHINGTON J. WOODWORTH,
Appellee,

vs.

CHARLES R. BAUMGARDT,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On March 5, 1916, appellee Woodworth sued Mr. Beck & Co., a corporation in the municipal court of Chicago for moneys due for salary and commissions.

On the same day the necessary affidavit was made and an attachment in aid issued. The summons was served on a number of the debtors as garnishees. These garnishees answered, admitting their indebtedness to the defendant, but alleging that prior to the service of the writ the accounts had been assigned to appellant, Charles R. Baumgardt and the garnishees notified thereof.

The defendant was a New York corporation. On the day the suit was begun in Illinois it was duly adjudged a bankrupt by the courts of New York.

On motion of the garnishees, receivers and the trustee in bankruptcy were made parties to the suit. The trustee in bankruptcy did not appear or make any claim to the funds.

Appellant Baumgardt filed a petition in intervention, in which he claimed the accounts by reason of the assignment by garnishees to him in writing for a valuable consideration on March 4, 1916, as collateral security for loans in the sum of $[illegible].00.

The plaintiff in the attachment suit answered

the intervening petition with other matters alleging that the pretended assignment was without consideration, fraudulent and void and was made for the purpose of placing the property of defendant beyond the reach of its creditors.

The case was tried by the court without a jury. Judgment was entered against the defendant corporation for the amount of plaintiff's claim and the court found that the judgment creditor was entitled to the accounts as against the intervening petitioner.

Propositions of law were not submitted by either party, nor do findings of fact appear in the record.

The assignment under which appellant claimed these accounts was introduced in evidence and appears to have been executed and delivered on the 2nd day of March, 1916. It is absolute on its face, the consideration therefor as stated being $51,000. A schedule of accounts assigned showed a total amount of $56,540.03.

At the time the assignment was executed and delivered, Fr. Beck & Co. did not receive any money from the intervening petitioner. However, for about two years Bauerdorf had been acting as trustee for certain stockholders of the defendant corporation who advanced money needed by the corporation.

The original transaction was entered into on September 14, 1914, when these parties advanced $41,000 to the defendant corporation for which demand notes were executed. At the same time an assignment of certain accounts of the corporation was made to Bauerdorf as trustee. Though absolute in form, the assignment was,

the intervening petition with other matters alleging that the pretended assignment was without consideration, fraudulent and void and was made for the purpose of placing the property of defendant beyond the reach of its creditors.

The cause was tried by the court without a jury. Judgment was entered against the defendant corporation for the amount of plaintiff's claim and the court found that the judgment creditor was entitled to the accounts as against the intervening petitioner.

Propositions of law were not submitted by either party, nor do findings of fact appear in the record.

The assignment under which appellant claimed these accounts was introduced in evidence and appears to have been executed and delivered on the [illegible] day of March, 1916. It is absolute on its face, the consideration therefor as stated being $31,0[illegible]. A schedule of accounts assigned showed a total amount of $[illegible],[illegible].

At the time the assignment was executed and delivered, Mr. [illegible] & Co. did not receive any money from the intervening petitioner. However, for about two years Bamerdort has been acting as trustee for certain stockholders of the defendant corporation and advanced money needed by the corporation.

The original transaction was entered into on September 14, 1914, when these parties advanced $[illegible] to the defendant corporation for which [illegible] notes were executed. At the same time an assignment of certain accounts of the corporation was made to Bamerdort as trustee. Though absolute in form, the assignment was

in fact, for the purpose of securing the payment of the indebtedness. No notice was given the debtors of the assignment. The accounts were collected in the usual way by the corporation and the proceeds thereof used by it. Upon the ledger, however, there appeared upon the pages showing these accounts the letter "A" which was meant to indicate the assignment.

After the original loan of $41,000, an additional loan of $10,000 was made and another list of accounts assigned to Bauerdorf to secure its payment. The assignment under which the intervening petitioner claimed, was the last of a series of similar assignments of accounts made upon the same consideration and to secure the same indebtedness.

Appellant contends that the last assignment was a substitution of other securities for those originally given which the parties had a right to make; that as the assignment was prior to the commencement of the attachment suit, the right of the assignee was superior to that of the attaching creditors.

We may accede to the first contention, but not to the second. The assignments under which appellant claims were absolute upon their face, while in fact given as collateral security. Such assignments are constructively fraudulent and void as to creditors. Beidler v. Crane, 135 Ill. 92; Clark v. Harper, 215 Ill. 24; Statutes of Fraud & Perjury, Chapter 59, Section 4; Best v. Fuller, 185 Ill. 43. Appellant, therefore, could not successfully claim title thereunder as against the attaching creditor.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

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We may accede to the first contention, but not to the second. The assignments under which appellant claims were absolute upon their face, while in fact given as collateral security. Such assignments are constructively fraudulent and void as to creditors. Weldin v. Crane, 180 Ill. 92; Clark v. Harper, 14 Ill. 44; Statutes of Fraud & Perjury, Chapter 59, Section 4; Root v. Miller, 180 Ill. 45. Appellant, therefore, could not successfully claim title thereunder as against the attaching creditor.

The judgment of the municipal court will be affirmed.

AFFIRMED.

274 - 23619

212 I.A. 657

PETER HOLLEMAN, ALBERT DEWEERD and HARRY DeWEERD, copartners trading as Helleman & DeWeerd Brothers,

Appellants,

vs.

W. R. HANES,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellants here, plaintiffs below, brought replevin to recover one Regal make, (1916, 8 cylinder, 5 passenger) automobile touring car. The court found that the right of property was not in plaintiffs and entered judgment for the return of it to the defendant and for damages.

Appellants are a copartnership engaged in the automobile business at Byron Center in the state of Michigan. Albert DeWeerd and Harry DeWeerd also own and operate a bank there. Haleigh DeWeerd, a brother, was the bookkeeper for plaintiffs in the automobile business.

Appellee, defendant, purchased the automobile in question in Chicago, Illinois, from one John M. Crell. The trial court found as a matter of fact that he was a bona fide purchaser of the car for value. Appellants, however, contend that the money with which the car was purchased was theirs; that the car came into possession of Crell as their agent; that on account of his fraudulent conduct, they prior to the sale of the car to defendant, Hanes, revoked Crell's agency; that Crell thereupon ran away with the car and disposed of it under circumstances

which amounted to embezzlement or larceny and they urge that Crell could not therefore, give to Hanes a better title than he had.

On the other hand appellee contends that the legal title to the car was in Raleigh O. DeWeerd and John M. Crell, either jointly or as copartners; that Crell, therefore, had a right as a member of this partnership, or as a joint owner, to dispose of it and that the purchaser in good faith and for value would take it free and clear of plaintiffs' equities.

It appears from the evidence that Crell came to plaintiffs' garage at Byron Center, Michigan, September 7, 1916, and suggested to them a plan by which it was claimed it would be made possible to purchase these Regal cars at a price lower than that usually given to dealers. As a result of his representations it was agreed that Raleigh O. DeWeerd should accompany him to Detroit for the purpose of buying two of the cars. Raleigh O. DeWeerd and John M. Crell went to Detroit and opened negotiations with the officials of the Regal Motor Car Company for the purchase. The plan was to get a reduction by taking out a contract of agency. Such a contract was negotiated and signed. It assigned to John M. Crell and Raleigh O. DeWeerd territory in which they were to operate as agents of the company. This territory or a part of it had already been assigned to one Miller, but through Crell's endeavors, Miller was persuaded to forego his rights.

An invoice of the car dated December 11, 1916, was from the Regal Motor Car Company to "R. O. DeWeerd and Crell". The records of the Regal Motor Car Company showed the sale of the car to "DeWeerd and Crell." The car order was "ship to R. O. DeWeerd and John M. Crell." The correspondence with regard to this and other cars which were purchased under the arrangement was addressed to "DeWeerd

[illegible] amounted to [illegible] on [illegible] that O'Neil could not [illegible] to [illegible] than he did.

On the other hand [illegible] that the legal title to the car was in Haleigh [illegible] and John W. [illegible], either jointly or as tenants [illegible], and a right as a member of this partnership, or [illegible] joint owner, to dispose of it and that the [illegible] with a fair value would take it free and clear of plaintiff's mortgage.

It appears from the evidence [illegible] plaintiff's agent in Grand Rapids, Michigan, [illegible], 1920, and suggested to them a plan by which it [illegible] Haleigh it would be made possible to purchase the car [illegible] price lower than it would prove to be [illegible] of his experience [illegible] should accompany [illegible] of the car. Haleigh [illegible] to Detroit and opened negotiations [illegible] Regal Motor Car Company [illegible] a reduction [illegible] was negotiated and [illegible] Haleigh [illegible] as agents of the company [illegible] had already been [illegible] however, [illegible]

In [illegible] was from the Regal [illegible] O'Neil". The [illegible] the sale of the car to [illegible] was "ably to" O. Howard [illegible] correspondence with [illegible] purchased under the arrangement [illegible]

and Crell" at Byron Center, Michigan. Plaintiffs received the mail at their bank and knew that the business was being conducted under the name of DeWeerd and Crell. The contract for the agency was in fact signed by Crell in the name of himself and Raleigh O. DeWeerd, and while Crell took the leading part in negotiations, it is clear that Raleigh O. DeWeerd who was present could not have misunderstood the nature of the transaction and it is also clear that the plaintiffs knew and understood it.

It is true that the check which paid for the car was plaintiffs. They furnished the consideration. They further gave to Crell the right which he from time to time exercised to draw upon them for $20.00 per week while he was giving his endeavors to the matter of securing agents in the territory assigned, and to the sale of automobiles therein. Nevertheless the facts show that while plaintiffs furnished the consideration for the purchase of the car, the legal title thereto was with their knowledge and consent placed in Raleigh O. DeWeerd and John M. Crell.

In an action of replevin the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary. Davidson v. Waldron, 31 Ill. 120. The holder of a mere equitable title cannot maintain replevin against the holder of the legal title, or against one standing in the position of a bona fide purchaser for value from one holding the legal title. Fawcett v. Osborn, 32 Ill. 411.

If it were true, as appellants contend, that Crell stole or embezzled the car, or if he were simply the bailee thereof, the rule for which appellants contend would obtain. He could under such circumstances give no better title than that which was in himself; but the court has found as a

and Grell" at Byron Center, Michigan. Plaintiffs received the mail at their bank and knew that the business was being conducted under the name of Dewsbery and Grell. The contract for the agency was in fact signed by Grell in the name of himself and Ralph O. Dewsbery, and while Grell took the leading part in negotiations, it is clear that Ralph O. Dewsbery who was present could not have misunderstood the nature of the transaction and it is also clear that the plaintiffs knew and understood it.

It is true that the check which paid for the car was plaintiffs. They furnished the consideration. They further gave to Grell the right which he from time to time exercised to draw upon them for $[illegible] per week while he was giving his endeavors to the matter of securing agents in the territory assigned, and to the sale of automobiles therein. Nevertheless the truth also is that while plaintiffs furnished the consideration for the purchase of the car, the legal title thereto was with their knowledge and consent placed in Ralph O. Dewsbery and John A. Grell.

In an action of replevin the plaintiff must recover on the strength of his own title and not on the weakness of that of his adversary. Davidson v. Gardner, 31 Ill. 120. The holder of a mere equitable title cannot maintain replevin against the holder of the legal title, or against one standing in the position of a bona fide purchaser for value from one having the legal title. Bawcett v. Calvin, [illegible] Ill. [illegible].

If it were true, as [illegible] contend, that Grell stole or embezzled the car, or if he were simply the bailee thereof, the rule for which appellants contend would obtain. He could under such circumstances give no better title than that which was in himself; but the court has found as a

fact that the legal title was in Crell and DeWeerd and we are unable to say that the finding is contrary to the evidence. It follows that Crell, holding the legal title, was able to transfer to the defendant, and that the defendant as a bona fide holder for value took the legal title free and clear of plaintiffs' equities. Where one of two innocent persons must suffer for the wrong of a third, the loss must fall on him who enabled the third person to commit the fraud. This plaintiffs did by placing in Crell the legal title to this automobile.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

fact that the legal title was in Crail and Dewsord and we are unable to say that the finding is contrary to the evidence. It follows that Crail, holding the legal title, was able to transfer to the defendant, and that the defendant as a bona fide holder for value took the legal title free and clear of plaintiffs' equities. Where one of two innocent persons must suffer for the wrong of a third, the loss must fall on him who enabled the third person to commit the fraud. This plaintiffs did by placing in Crail the legal title to this automobile.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

301 - 23646

212 I.A. 657

EDWARD ABBOTT BEARD, by Henry Beard, his next friend, Appellee, vs. MARY R. PRESCOTT et al., Appellants.	Appeal from Circuit Court of Cook County.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree construing the last will and testament of Martha S. Hill. The bill was brought by Edward Abbott Beard, a minor, who is the grandchild of Mary R. Prescott, one of the appellants. Said Mary R. Prescott is a sister of the said testatrix and a beneficiary under said will.

The will in question was executed on the 21st day of January, A. D. 1913. The testatrix died August 4th of the same year. Her last will and testament was admitted to probate on September 15th, following. The complainant was born on the 27th day of April, 1916.

The will after the payment of debts, devised all the rest and residue of the estate to trustees therein named to be held upon certain trusts. Clause 10 (which is the part construed) directed that after the payment of expenses, said trustees should pay each and every year the income from the remainder of the estate as follows:

> " (a) The net income from one-half of the rest, residue and remainder of my estate, to my sister Mary R. Prescott and her children and grandchildren, in the following proportions: one-fourth thereof to said Mary R. Prescott for life; three-fourths thereof to the <u>living</u> children and grandchildren of said Mary R. Prescott, <u>per capita</u> and not <u>per stirpes</u>. * * * * * * ."

The question is whether the complainant who was born subsequent to the death of the testator is entitled to share in the distribution of the net income annually

301 - 23646

SIZIA. 657

EDWARD ABBOTT BEARD, by Henry Beard, his next friend, Appellee,	Appeal from Circuit
vs.	Court of Cook County.
MARY R. PRESCOTT et al., Appellants.	

MR. JUSTICE MARCHMONT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree construing the last will and testament of [illegible]. Will. The bill was brought by Edward Abbott Beard, a minor, who is the grandchild of Mary R. Prescott, one of the appellants. Said Mary R. Prescott is a sister of the said testatrix and a beneficiary under said will.

The will in question was executed on the 1st day of January, 1. . 1911. The testatrix died August 4th of the same year. The last will and testament was admitted to probate on September 4th, following. The complainant was born on the 7th day of April, 1912.

The will after [illegible] payment [illegible], devised all the rest and residue of the estate to trustees therein named to be held upon certain trusts. Clause IV (which is the part construed) directed that after the payment of expenses, said trustees should pay [illegible] every year the income from the remainder of the estate as follows:

> " (a) The net income from one-half of the rest, residue and remainder of the estate, to my sister Mary R. Prescott and her children and grandchildren, in the following proportions: one-fourth thereof to said Mary R. Prescott for life; three-fourths thereof to the children and grandchildren of said Mary R. Prescott, per capita and not per stirpes. [illegible] ."

The question in which the complainant claims was born subsequent to the death of the testator is entitled to share in the distribution of the net income annually

as a grandchild of said Mary R. Prescott. The trial court decreed that he was so entitled in all respects the same as if he had been born in the lifetime of said Martha S. Hill and had been living at the time of her death.

It is only elementary to say that in cases of this kind the intention of the testator must control where it does not controvert positive rules of law. Was it the intention of this testator to include appellee in the distribution of her bounty? Appellants say that the decree wholly disregards and gives no meaning to the word "living"; that its usual meaning is equivalent to "living at testatrix's death"; that it was inconvenient for the testatrix to designate the fourteen children and grandchildren of Mary R. Prescott by name; that she, therefore, described them as "the living children and grandchildren of said Mary R. Prescott"; that this intention is also indicated in that remembering in this will similarly the children and grandchildren of Margret Y. Hill, who were few in number, they were described by name.

We are not convinced by these suggestions. In the first place the fact that the testatrix saw fit to defer distribution to a time subsequent to her death, indicates, we think, her intention that the word "living" as used refer to the time of such distribution. That she did not name the grandchildren of Mary R. Prescott but did name those of Margaret Y. Hill was not as we think because of the numerous persons belonging to the one class, as compared to the other, but rather because of her intention to provide for the children and grandchildren of the one as a class, and to make provision for the others as individuals.

as a grandchild of said Mary R. Prescott. The trial court decreed that he was so entitled in all respects the same as if he had been born in the lifetime of said testrix, Will and had been living at the time of her death.

It is only elementary to say that in cases of this kind the intention of the testator must control where it does not contravert positive rules of law. Was it the intention of this testator to include appellee in the distribution of her bounty? Appellants say that the decree wholly disregards and gives no meaning to the word "living"; that its usual meaning is equivalent to "living at testatrix's death"; that it was inconvenient for the testatrix to designate the fourteen children and grandchildren of Mary R. Prescott by name; that she, therefore, described them as "the living children and grandchildren of said Mary R. Prescott"; that this intention is also indicated in that remembering in this will similarly the children and grandchildren of Margaret Y. Hill, who were few in number, they were described by name.

We are not convinced by these suggestions. In the first place the fact that the testatrix saw fit to defer distribution to a time subsequent to her death, indicates, we think, her intention that the word "living" as used refer to the time of such distribution. That she did not name the grandchildren of Mary R. Prescott but did name those of Margaret Y. Hill was not a mere inadvertence of the numerous persons belonging to the one class, as compared to the other, but rather because of her intention to provide for the children and grandchildren of the one as a class, and to make provision for the others as individuals.

This intention is, we think, further indicated by other expressions used in the will where testatrix speaks of this class. She says "the portion of any grandchild under the age of twenty-one years to be paid to the parent of such grandchild." There is no limitation on the word "grandchild." She does not even say "any living grandchild." The words are used in the widest possible sense. She is so careful to provide for "any grandchild" that while the grandchild is under twenty-one years of age, its share of the income is to be paid to its parent for the grandchild's use.

In another clause she provides, "In the event of the death of Mary R. Prescott within twenty years after my death, then and in such case her portion of the net income shall be added to the portion of the living children and grandchildren as hereinbefore provided." The testatrix here is speaking of a time in the future, possibly twenty years after her own death should occur. It would be a forced construction to say, that the word "living" used in this connection means those living twenty years prior to the time of which the testatrix speaks.

Again this will provides that upon the death of Mary R. Prescott, the said one-half of the rest, residue and remainder of her estate shall "descend to and be divided between the then living children and grandchildren of said Mary R. Prescott, per capita, share and share alike." For what reason would the testatrix desire to pass the estate itself to a grandchild of Mary R. Prescott (which it is conceded this clause does) but deprive the same grandchild of the income of that estate?

We are satisfied from a consideration of the whole will that the construction of the decree expresses

This intention is, we think, further indicated by other expressions used in the will where testatrix speaks of this class. She says "the portion of any grandchild under the age of twenty-one years to go part to the parent of such grandchild." There is no limitation on the word "grandchild." She does not even say "any living grandchild." The words are used in the widest possible sense. She is so careful to provide for "any grandchild" that while the grandchild is under twenty-one years of age, its share of the income is to be held to its account for the grandchild's use.

In another clause she provides, "In the event of the death of Mary R. Prescott within twenty years after my death, then and in such case her portion of the net income shall be added to the portion of the living children and grandchildren as herein before provided." The testatrix here is speaking of a time in the future, possibly twenty years after her own death should occur. It would be a forced construction to say, that the word "living" used in this connection means those living twenty years prior to the time of which the testatrix speaks.

Again this will provides that upon the death of Mary R. Prescott, the said one-half of the net, residue and remainder of her estate shall "descend to the relatives between the then living children and grandchildren of said Mary R. Prescott, per capita, share and share alike." For what reason would the testatrix [illegible] estate itself to a grandchild of Mary R. Prescott [illegible] is conceded this income does) but [illegible] grandchild of the income of that account?

We are satisfied from a consideration of the whole will that the construction of [illegible] expressions

the intention of the testator, and is in harmony with the rules of law as announced in decisions of the courts.

It is undoubtedly true as appellants contend that a will generally "speaks" as of the date of the death of the testator. Updike v. Tompkins et al., 100 Ill. 406. It is also true as contended by appellants that an immediate gift to a class takes effect in favor of those and those only who constitute such class at the testator's death, unless it is manifest from the language of the will that the testator intended otherwise. Jarmon on Wills, 6th Ed. Vol. 2, page 664; Schouler on Wills, 5th Ed. Vol. 1, Sec. 529; Ingraham v. Ingraham, 169 Ill. 432. But that rule is not controlling in this case because the gift here is not simpliciter to these grandchildren, but on the contrary is made to and vested in trustees, who are to make future distribution.

By the great weight of authority, where the distribution of a legacy or the income from a trust is to be made to a class at a time or times later than the date of death of the testator, the class to which distribution is to be made is fixed by the time of distribution, rather than as of the time of the death of the testator.

We understand appellants to concede that the law is so declared in Dime Savings Bank v. Watson, 254 Ill. 419, but they say the rule as there announced was not necessary to the decision of the case; that authorities were not cited in support of it, and relying upon Shotts v. Poe, Admx., 47 Md. 513, they ask us to regard the rule there announced as dicta and practically overrule it.

The rule there stated was necessary to the decision. We have no right to regard it as mere dicta. While authorities were not cited, abundant authorities

the intention of the testator, and is in harmony with the rules of law as announced in decisions of the courts.

It is undoubtedly true as appellants contend that a will normally "speaks" as of the date of the death of the testator. Jodiko v. Longking et al., 167 Ill. 655. It is also true as contended by appellants that an immediate gift to a class takes effect in favor of those and those only who constitute such class at the testator's death, unless it is manifest from the language of the will that the testator intended otherwise. Jarman on Wills, 6th Am. Ed. 2, page 664; Schouler on Wills, 6th Ed. Vol. I, sec. 609; Ingraham v. Ingraham, 169 Ill. 602. But this rule is not controlling in this case because the gift here is not simplicter to these grandchildren, but on the contrary is made to and vested in trustees, who are to make future distribution.

By the great weight of authority, where the distribution of a legacy or the income from it is to be made to a class at a time or times later than the date of death of the testator, the class to be distributed is to be made in fixed by the time of distribution, rather than as of the time of the death of the testator.

We understand appellants to contend that the law is so declared in Illinois Savings Bank v. Kaiser, 254 Ill. 119, but they say the rule as there announced is not controlling to the decision of the case; that authorities were not cited in support of it, and that Jarman and Schouler v. Ingraham, 4 id. 512, they are in conflict with the announced as dicta and practically overrule it.

The rule there stated was necessary to the decision. We have no right to regard it as mere dicta. While authorities were not cited, abundant authorities

exist and it may be the court regarded the law as settled and the citation of authorities unnecessary. It is true the decision was by a divided court, but the dissenters did not question the general rule which had been previously announced in many jurisdictions. The rule was approved in England in the case of Shepherd v. Ingram, 1 Ambler 448, decided by the high court of chancery in 1764. There a testator gave the residue of his estate to the child or children of his daughter. After his death, three children were born to the daughter named. Two of these children brought a bill against the third child to have an account of the profits and income of the estate. The bill asked that from the birth of the first child, until the second was born, these might be decreed to belong to the first child; from the birth of the second child until the third was born, to the first and second children jointly, and after the birth of the third child, to all three children. The lord chancellor entered a decree "according to the prayer of the bill with liberty to apply in the case of birth of any child." See also Devisme v. Mello, 1 Brown's Chancery Cases 537; Ayton v. Ayton, 1 Cox (Eng.) 327. The rule has been generally adopted by American courts.

In the case of Webber v. Jones, 94 Me. 429, the court said -

> "The rule is that where a legacy is given to a class of individuals, not by a designatio personarum, but in general terms, as 'to the grandchildren of A.,' and no period is fixed for the distribution of the legacy, it is to be considered as due at the death of the testator; and none but children who were born or begotten previous to that time can share in the legacy. But where there is by the will a postponement of the division of the legacy until a period subsequent

exist and it may be the court regarded the law as settled and the citation of authorities unnecessary. It is true the decision was by a divided court, but the dissenters did not question the general rule which had been previously announced in many jurisdictions. The rule was approved in England in the case of Shogwood v. Lucrum, 1 Ambler 448, decided by the high court of chancery in 1764. There a testator gave the residue of his estate to the child or children of his daughter. After his death, three children were born to the daughter named. Two of these children brought a bill against the third child to have an account of the profits and income of the estate. The bill asked that from the birth of the first child, until the second was born, these might be secured to belong to the first child; from the birth of the second child until the third was born, to the first and second children jointly, and after the birth of the third child, to all three children. The lord chancellor entered a decree 'according to the prayer of the bill with liberty to apply in the case of birth of any child.' See also Jackson v. Lalla, 1 Brown's Chancery Cases 267; Upton v. Upton, 1 Ch. (Eng.) 324. The rule has been generally adopted by American courts.

In the case of Ashby v. Jones, 34 Ga. 448, the court said -

"The rule in this state is a legacy is given to a class of individuals, not by a descriptio personarum, but in general terms, as 'to the grandchildren of A.,' and no period is fixed for the distribution of the legacy, it is to be construed as a gift to the children of the testator; unless there be antecedent words or bequeathed provisions to show the contrary. But where such words in the will, or circumstances, of the division of the legacy, evince a different intent,

to the testator's death, every one who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, though not in esse at the death of the testator, unless there is something in the will to show a contrary intention on the part of the testator."

In Hale v. Hobson, 167 Mass. 399, the court said -

"He directs his trustees then to divide the residue and remainder with its accumulated interest equally amongst his grandchildren. What grandchildren? It seems to us more reasonable to suppose that the grandchildren living at the time of distribution were intended, than the grandchildren living at his death. * * * * * ."

In Voorhies v. Otterson, 66 N. J. Eq. 172, the court said -

" * * * * But it should be noted that the testator, in phrasing his intended gift, did not mention any of Josephine Otterson's children by name, and that, although the legacies were bestowed upon them individually, and not as a class, yet the sole characteristic required of the several legatees was that each should be a child of his daughter Josephine Otterson. This mode of expressing his purpose shows that, in giving these legacies, the testator did not have in mind any particular child or children of his daughter Josephine whom he wished to benefit, but that he intended to confer these legacies upon each child that Josephine either had or might have."

See also Teed v. Morton, 60 N. Y. 502; Haug v. Schumacher, 166 N. Y. 506.

In these views of the courts the text writers concur.

In Thompson on Wills (1916) Par. 191, the author says -

"Where there is no gift, but a direction to pay and divide at a future time or on a given event, the vesting will be postponed until the time appointed for the division or the happening of the specified event; unless a contrary intent can be collected from the whole will. And where legacies are given to a class, all are deemed to be included who answer the description at the time the legacy is payable, so that where the legacy is payable at a future time, those who come into being intermediate the death of the testator and between the time of payment, and answer the description, take as independent objects."

In Schouler on Wills, 5th Ed. Vol. 1, Par. 530, the author after stating the general rule contended for by

to the testator's death, every one who answers the description, so as to come within that class at the time fixed for the division, is entitled to share, though not in esse at the death of the testator, unless there is something in the will to show a contrary intention on the part of the testator."

In Hale v. Hobson, 187 Mass. 399, the court said -

"He directs his executors then to divide the residue and remainder with his immediate interest equally amongst his grandchildren. That expression fairly seems to us more reasonable to suppose that the grandchildren living at the time of distribution were intended, than the grandchildren living at his death. * * * * ."

In Voorhies v. Tiernan, 6 N. J. Eq. 17, the court said -

" * * * But it should be noted that the testator, in breaking his intended gift, did not mention any of Josephine Ottersen's children, by name, and, although with them legacies were bestowed upon them individually, and not as a class, yet the sole characteristic recognized of the accused legatees was that each should be a child of his daughter Josephine Ottersen. This mode of expressing his purpose shows that, in giving to a legatee, the testator did not have in mind any particular child or children of his daughter Josephine who [illegible] to benefit, but that he intended to confer the legacies upon each child that Josephine might have or have."

See also Ford v. Winton, [illegible] N. Y. [illegible]; Ford v. Schumacher, 190 N. Y. 206.

In these views of the courts the text writers concur.

In Thompson on Wills (1926) sec. 141 the author says -

"Where there is no gift, but a direction to pay and divide at a future time or on a [illegible] event, the vesting will be postponed until the time ascertained for the division or [illegible] of the legacy, [illegible] event; unless a contrary intent [illegible] from the whole will. [illegible] to a class, it is held in the final [illegible] the description [illegible] legacy is payable [illegible] who come into being intermediate the [illegible] testator and between the time of [illegible] the description, [illegible]

In Schouler on Wills, 5th ed. vol. 1, sec. [illegible], the author after stating the general rule contended for by

appellants, says -

> "Notwithstanding the above rule, the judicial disposition is to let in subsequent issue and near relations of a class as generously as possible where the terms of the will justify a distinction. That distinction is found when the aggregate fund to the class is not distributable at once and the question who shall compose the class may conveniently be postponed; or, in general, where the total amount of the gift does not depend upon the number of participants admitted to share it. Hence, the English rule, confirmed by many American precedents, that the devise or bequest of a corpus or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death but so as to open and let in children who may come into existence afterwards at any time before the fund is distributable. And this rule of construction, like the former one, extends its favor to grandchildren, issue, brothers, nephews and cousins. * * * * All limitations future in enjoyment and not immediate appear to come within the scope of this maxim."

If it were true as appellants contend that the Maryland courts hold the contrary (which we think doubtful) we should refuse to follow them for the reason that the Supreme Court of this state in conformity with the weight of authority both in England and America has decided otherwise.

The decree will be affirmed,

AFFIRMED.

appellants, says -

"Notwithstanding the above rule, the judicial disposition is so [illegible] in numerous [illegible] and most relations of a class as generously as possible were the terms of the gift justify a distribution. But distinction is found when the aggregate fund to the class is not clearly [illegible] and the question who shall compose the class may conveniently be postponed; or, in other words, that the total amount of the gift does not depend upon the number of participants entitled to share it. Hence, the English rule, contained by many American precedents, that the devise or bequest of a sum or aggregate fund to children as a class, where the gift is not immediate, vests in all the children in existence at the testator's death (or so in the case of a [illegible] children who may come into being before the [illegible] any time before the fund is distributable, and the rule of non truction, like the former one, extends its favor to grandchildren, issue, brothers, nephews and cousins. * * * All limitations [illegible] enjoyment and not immediate gifts to come within the scope of this maxim."

If it were true as appellants [illegible] the Maryland courts hold the contrary (see [illegible]) we should refuse to follow them [illegible] the Supreme Court of this state [illegible] right of authority both in [illegible] and otherwise.

The decree will be affirmed.

[illegible]

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212 I.A. 658

ARIZONA FIRE INSURANCE COMPANY, a corporation,
Appellant,

vs.

ALEXANDER SMULLAN doing business as ALEXANDER SMULLAN & COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below appeals from a judgment entered in favor of defendant on a claim of off-set for damages sustained, as defendant claimed, through the unjustifiable revocation of a written contract entered into between the parties on the 26th day of November, 1913. By its terms the Arizona Fire Insurance Company appointed appellee its agent "for the city of Chicago, County of Cook and State of Illinois, with full power of authority to appoint and remove agents, and generally to conduct the business of said company in the territory above mentioned, in accordance with instructions received from time to time from said company." As compensation for such services, appellant agreed to pay to appellee a remuneration or commission as provided in the contract. By its terms the contract was to commence December 1, 1913, and continue for a period of five years from that date.

Appellant had not theretofore had an office in Chicago. Appellee proceeded to carry out his part of the contract and during the first year both parties were evidently satisfied with results, but thereafter a controversy arose as to whether the contract was one for an exclusive agency. This controversy became the subject of extended correspondence. About June 1, 1915, appellant cancelled the contract and appointed another agency to which it transferred its

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SIS I.A. 358

ARIZONA FIRE INSURANCE COMPANY, a corporation, Appellant,	)
vs.	)
ALEXANDER SMULLAN doing business as ALEXANDER SMULLAN & COMPANY, Appellee.	)

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

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Appellant had not theretofore had an office in Chicago. Appellee proceeded to carry out his part of the contract and during the first year had certain expenses, which he settled with results, but thereafter a controversy arose as to whether the contract was one for an exclusive agency. This controversy became the subject of extensive correspondence. About June 1, 1915, appellant cancelled the contract and appointed another agency to which it transferred its

business and later brought suit for the amount of premiums alleged to be due it from appellee. Appellee filed an off-set claiming damages on account of the wrongful termination of the contract and upon this counter claim obtained judgment.

Two questions arise upon the record - first, was appellant justified in revoking the agency of appellee, - second, does the evidence sustain the finding and judgment of the court with reference to the amount of damages assessed. It is not seriously contended that the contract was not one for an exclusive agency. The affidavit of merits to appellee's statement of off-set alleged many matters as justifying the revocation of appellee's agency, but upon the trial evidence was introduced tending to sustain only one of these as follows.

It is customary for fire insurance agents to issue what are known as "binders" in cases where immediate protection is desired and there is not time to issue a formal policy in the usual course of business. Upon the issuing of the policy, the "binder" is released. A number of such "binders" were issued by appellee in the name of appellant company during the months of November and December, 1914. The net amount of the premium due to appellant therefor was $37.16, for which a check was mailed by appellee on the first day of June, 1915. These "binders" had not been reported to appellant in the usual monthly statement of account.

Appellee testified and his evidence is not contradicted, that he did not know that these items had been omitted from the statements until a day or two before the check for same was mailed; that the account was made up by a clerk in his office without his knowledge. His testimony is corroborated by the clerk who explained that a new stamp tax was about to go into effect which it was desired, if possible, to collect from the holders of the

business and later brought suit for the amount of premiums alleged to be due it from appellee. Appellee filed an off-set claiming damages on account of the wrongful termination of the contract and upon this counter claim obtained judgment.

Two questions arise on the record - first, was appellant justified in revoking the agency of appellee, - second, does the evidence sustain the finding and judgment of the court with reference to the amount of damages assessed. It is not seriously contended that the contract was not one for an exclusive agency. The affidavit of merits to appellee's statement of off-set alleged many matters as justifying the revocation of appellee's agency, but upon the trial evidence was introduced tending to sustain only one of these as follows.

It is customary for fire insurance agents to issue what are known as "binders" in cases where immediate protection is desired and there is not time to issue a formal policy in the usual course of business. In the issuing of the policy, the "binders" are returned. A number of such "binders" were issued by appellee in the name of appellant company during the month of [illegible], 1914. The not amount of the premium due on [illegible] therefor was $27.15, for which a check was mailed by appellee on the first day of June, 1914. These "binders" had not been reported to appellant in the usual manner by statement of account.

Appellee testified and [illegible] contradicted, that he did [illegible] had been omitted from the statements [illegible] the check for same was mailed; [illegible] by a clerk in his office with [illegible] testimony is corroborated by the clerk who [illegible] a new stamp tax was about to go into effect on which it was desired, if possible, to collect from the owners of the

policies; that he was overwhelmed with work and had put these items aside; that when at a later date he noticed them, he thought he would be subject to criticism if the matter was taken up, and as all the binders issued had been cancelled and the items were so small in amount, he had passed them into the profit and loss account. He testifies positively to facts which show that whatever blame there was in the matter, was his fault.

It was a small sum comparatively which was involved in these items. The total amount of premiums passing through appellee's hands in one year was $191,342.51. It is not easy to believe that while handling these large sums of money in an honest way, appellee would intentionally convert to his own use the small sum of $37.16.

We have carefully read the correspondence between the parties. We think it indicates that appellant itself did not believe that there was any intention to cheat it in this matter. An unintentional mistake made by a responsible party acting as agent for another which is at once made good upon its discovery, cannot be considered as a sufficient reason for breaking a solemn contract. We think that the trial court properly held that the agency was an exclusive one, and that its revocation was not justified.

It remains to consider the question of whether the evidence sustains the assessment of damages. It is insisted by appellant that these damages were speculative. The evidence submitted in appellee's behalf on this subject was not denied by appellant. Whatever there may be in it of uncertainty or speculation it is uncontradicted.

Appellee introduced evidence tending to show the amount of money expended by him and the value of his time etc. in building up the business under the contract while it was in force. These things were in the nature of proof of

politics; that he was overwhelmed with work and had put these items aside; that when at a later date he noticed them, he at once he would be subject to criticism if the matter was taken up, and as all the vouchers issued had been cancelled and the items were or would be secret, he had passed them into the profit and loss account. He testifies positively to have made full disclosure whatever blame there was in the matter, was his fault.

It was a small sum comparatively, we can see involved in these items. The total amount of payments passing through appellee's hands in one year was $197,441.61. It is not easy to believe that anyone handling those large sums of money in an honest way, appellee could intentionally convert to his own use the small sum of $1,410.

We have carefully read the correspondence between the parties. We think it indicates that appellant really did not believe that there was any intention on their part in this matter. An unintentional mistake made by a responsible party acting as agent for another, which is once made & on upon its discovery, cannot be [illegible] [illegible] known in presenting a sole a contract. [illegible] the [illegible] property held that [illegible] was an exclusive one, and that its revocation was not justified.

It remains to consider the question of [illegible] the evidence sustaining the [illegible] of fraud. [illegible] by appellant that [illegible] [illegible]. The evidence submitted in appellee's behalf [illegible] [illegible] by appellant. Whatever [illegible] may [illegible] or speculation it is [illegible].

Appellee introduced [illegible] amount of money [illegible] etc. In filling up the [illegible] [illegible] it was in force. These things were in the nature of proof of

quantum meruit, and if appellee had stopped there he would have been entitled to recovery for the value of such services and the amount so expended. United States v. Frank A. Behan, 110 U. S. 338. But appellee did not stop there. He claimed a larger amount which it was asserted would have accrued to him as profits under the contract. He introduced two lines of evidence for the purpose of proving the amount which he should recover. First, he proved the net profit per month which had accrued to him under the contract prior to the time when it was revoked, and this net amount per month was multiplied by the number of months which the contract had yet to run at the time of its cancellation.

We think this proof was proper. "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty." This was the method by which damages were assessed in the case of Barnett v. Caldwell Furniture Company, 277 Ill. 286, and the method was there approved by the Supreme Court of this state.

But there was a second method by which it was possible to ascertain the amount of these profits with reasonable certainty and that was to calculate the profits of the business done by the new agent up to the time of the maturity of the contract. This method has also been approved by the courts in well considered cases. Mueller v. Bethesda Mineral Spring Co., 50 N. W. 319; Pittsburgh Gauge Company v. Ashton Valve Company, 184 Pa. State 36; Wells v. National Life Association, 99 Fed. Reporter, 222. The computation made by the first method would make the amount of appellee's damages $600 more than the computation by the second method. The trial court in this case adopted the second method of computation thus finding for appellee the lesser amount. Of this appellant cannot complain.

quantum meruit, and if appellee had stopped there he would have been entitled to recover for the value of such services and the amount so expended. United States v. Trent R. Co., 110 U. S. 338. But appellee did not stop there. He claimed a larger amount which it was contended could be counted to his as profits under the contract. He introduced two lines of evidence for the purpose of proving the amount which he should recover. First, he proved the net profit per month which had accrued to him under the contract prior to the time when it was revoked, and this net amount per month was multiplied by the number of months which the contract had yet to run at the time of its cancellation.

We think this rule was wrong. "A recovery may be had for prospective profits when there is an criteria by which the probable profits can be ascertained with reasonable certainty." This was the method [illegible] were measured in the case of Bennett v. [illegible] Co., 277 Ill. 386, and the method was [illegible] by the [illegible] of this state.

But there was a second method by which it was possible to ascertain the amount of some profits with reasonable certainty and that is to calculate the profit of the business done by the [illegible] to the time of the termination of the contract. This method has also been approved by the courts in well considered cases. [illegible] v. Chicago [illegible] Co., 80 N. [illegible] 319; [illegible] 184 Ia. [illegible] 36; [illegible] Reporter, 222. The computation [illegible] would make the amount of [illegible] computation by the [illegible] case adopted the second [illegible] for applying the lesser [illegible] complain.

The findings of the trial court and the judgment entered thereon are sustained by the evidence and the judgment will be affirmed.

AFFIRMED.

The findings of the trial court and the judgment entered thereon are sustained by the evidence and the judgment will be affirmed.

AFFIRMED.

378 - 23723

212 I.A. 658

ALFRED H. SMITH,
Appellee,

vs.

FRANKFORT GENERAL INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below who is appellee here sued the defendant, appellant, upon its endorsement of a promissory note dated June 25, 1913, for the sum of $200.00 due thirty days after date to the order of appellant. The note was originally made and delivered to appellant by O'Brien & Company, a corporation.

Plaintiff's amended statement of claim alleged that the note was presented for payment on the day it became due and that it was not paid and that notice thereof was given to the defendant. This was denied by the defendant and the trial court found as a fact that there had been no presentment. Plaintiff claimed, however, that there was a waiver by defendant of presentment, and upon that issue apparently the trial court found for the plaintiff and entered judgment on the finding. The controlling question in the case, therefore, is whether the evidence was sufficient to establish said waiver.

The plaintiff testified that prior to the maturity of the note at the suggestion of Mr. Bergold, who was the agent of defendant, plaintiff put the note in the Central Trust Company, which was plaintiff's own bank for collection; that a day or two thereafter the note was returned to

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ALFRED H. SMITH,
Appellee,

vs.

PRAIRIEFORT GENERAL INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

21 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff below who is appellee here sued the defendant, appellant, upon its endorsement of a promissory note dated June 26, 1923, for the sum of $1,000 due thirty days after date to the order of appellant. The note was originally made and delivered to appellant by O'Brien & Company, a corporation.

Plaintiff's amended statement of claim alleged that the note was presented for payment on the day it became due and that it was not paid and that notice thereof was given to the defendant. This was denied by the defendant and the trial court found on a first issue that had been no presentment. Plaintiff claimed, however, that there was a waiver by defendant of presentment, and on that issue apparently the trial court found for the plaintiff and entered judgment on the finding. The controlling question in the case, therefore, is whether the evidence was sufficient to establish such waiver.

The plaintiff testified that prior to the maturity of the note at the suggestion of Mr. Sargent, who was the agent of defendant, plaintiff put the note in the Central Trust Company, which was plaintiff's own bank for collection; that a day or two thereafter the note was returned to

plaintiff when he went to Mr. Bergold and showed the note to him and Mr. Bergold suggested that the note be put in the bank again. Plaintiff thought that the second time he went to Mr. Bergold about the matter was perhaps four days after the maturity of the note and immediately when the note was returned to him by the bank.

He further testifies, "I put it in the second time and I took it to Mr. Bergold again and he said, 'You give me the note and I will take the note and get the money on it'. I suggested to him that the money was mine and that I wanted the money and he said, 'You leave it to me Al, and I will take the note and get the money'. Afterwards I made a demand on the company for the money several times. Mr. Bergold referred me to the New York office, Mr. Frankfort. I asked Mr. Bergold to pay the note two or three times. He made no objection to the demand of the note. He referred me to the New York office."

Plaintiff further testified that the makers of the note having gone into bankruptcy some fifteen days after the maturity of the note, the attorney for defendant requested that the note be given to him to file as a claim against the bankrupt estate; that the claim was filed in plaintiff's name and that he received a dividend thereon of $53.04 from the bankrupt's estate. This is substantially the evidence on which plaintiff relied to establish a waiver of presentment.

We do not think the evidence is sufficient to establish the plaintiff's claim in this regard. The suggestion by defendant's agent prior to the maturity of the note that the plaintiff should put the note in his own bank, cannot be construed as amounting to a

plaintiff when he went to Mr. Bergold and showed the note to him and Mr. Bergold suggested that the note be put in the bank again. Plaintiff thought that the second time he went to Mr. Bergold about the matter was perhaps four days after the maturity of the note and therefore, the note was returned to him by the bank.

He further testified, "I put it in the second time and I took it to Mr. Bergold again and he said, 'You give me the note and I will take the note and get the money on it'. I suggested to him that the money was mine and that I wanted the money and he said, 'You leave it to me Al, and I will take the note and get the money'. Afterwards I made a demand on the company for the money several times. Mr. Bergold referred me to the New York office, Mr. Frankfort. I asked Mr. Bergold to pay the note two or three times. He made no objection to the demand of the note. He referred me to the New York office."

Plaintiff further testified that the makers of the note having come into bankruptcy some fifteen days after the maturity of the note, the attorney for defendant requested that the note be given to him to file a claim against the bankrupt estate; that the claim was filed in plaintiff's name and that he received a dividend thereon of $32.04 from the bankrupt's estate. This is substantially the evidence on which plaintiff relied to establish a waiver of presentment.

We do not think the evidence is adequate to establish the plaintiff's claim in this regard. The suggestion by defendant's agent prior to the maturity of the note that the plaintiff should put the note in his own bank, cannot be construed as amounting to a

waiver of presentment. On the contrary, it would be reasonable to infer from that request that it was the intention that the bank should make presentment of the note at maturity and give notice of its dishonor if it was not paid. Nor does the evidence as we think establish the waiver of presentment after the maturity of the note, even assuming that the agent Bergold had authority to bind the corporation in that regard, and further assuming that the language used by him amounted to a promise to pay the note. It does not appear that the defendant was at any time informed by the plaintiff or any one else, or had any knowledge that presentment of the note had not in fact been made. Indeed, the evidence indicates that up to the time the case went to trial, the plaintiff himself believed (erroneously) that such presentment had been made. The defendant, therefore, at the time of its alleged promise to pay the note was in entire ignorance of the fact that demand had not been made upon the maker. Under such circumstances a mere promise to pay would not amount to unconditional waiver of presentment. Parks v. Smith, 155 Mass. 26; U. S. Bank v. Southard, 17 N. J. Law 473; Glidden v. Chamberlain, 167 Mass. 486; Hurd's Rev. Stat. 1913, Chap. 98, sections 70, 71, 73, 83 and 102.

The plaintiff therefore cannot recover. The judgment of the trial court will be reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

waiver of presentment. On the contrary, it would be reasonable to infer from that request that it was the intention that the bank should make presentment of the note at maturity and give notice of its dishonor if it was not paid. Nor does the evidence as we think establish the waiver of presentment after the maturity of the note, even assuming that the agent Sorgold had authority to bind the corporation in that regard, and further assuming that the language used by him amounted to a promise to pay the note. It does not appear that the defendant [illegible] at any time informed by the plaintiff or any one else, or had any knowledge that presentment of the note had not in fact been made. Indeed, the evidence indicates that [illegible] the case went to trial, the plaintiff [illegible] erroneously that such presentment had been made. The [illegible], therefore, at the time of its [illegible] the note was in entire ignorance of the fact [illegible] not been made upon the maker. Under such circumstances a mere promise to pay would not amount to [illegible] waiver of presentment. Parke v. Smith, 198 Mass. 26; [illegible] v. [illegible], 17 N. J. Law 472; Giddon v. [illegible], 187 Ind. 186; Burd's Rev. Stat. 1912, Chap. 18, Section 26, VI, 24, [illegible] and 102.

The plaintiff therefore cannot recover. The judgment of the trial court will be reversed with directions of fact.

[illegible]

FINDINGS OF FACT.

We find there was no waiver by appellant, Frankfort General Insurance Company, of presentment at maturity of the note herein sued on to the maker thereof.

378 - 22723

FINDINGS OF FACT.

We find there was no waiver by appellant, Fremont General Insurance Company, of premium at maturity of the note herein sued on or of any interest.

388 - 23733

212 I.A. 658

WILLIAM R. MUMFORD et al.,
Appellants,

vs.

THOMAS DONALDSON,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiffs, who are appellants here, sued the defendant, appellee, to recover a balance of $192.02, claimed to be due from defendant upon certain transactions involving the purchase and sale of oats, corn and mess pork on the Board of Trade in Chicago.

The jury rendered a verdict for the defendant upon which the court entered judgment.

The defense relied on was that the transactions out of which the alleged indebtedness arose were in violation of chapter 38, section 130 of the Criminal Code of the State of Illinois.

The only testimony in the case was given on behalf of the plaintiffs by Clarence R. Mumford. He testified that he had been a member of the Chicago Board of Trade for about 30 years; that the defendant, Donaldson, who prior to these transactions had dealt with the plaintiffs, called one day at plaintiffs' office and left a check for $500.00 with the bookkeeper and thereafter gave several orders to buy and sell corn and oats which plaintiffs did; that each sale was made at a profit; that later by defendant's order plaintiffs bought for him 250 barrels mess pork at $17.02½, which trade resulted in a loss of

388 - 23733

212I.A. 638

WILLIAM R. MUNFORD et al.,
Appellants,

vs.

THOMAS DONALDSON,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MACDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiffs, who are appellants here, sued the defendant, appellee, to recover a balance of $192.02, claimed to be due from defendant upon certain transactions involving the purchase and sale of oats, corn and mess pork on the Board of Trade in Chicago.

The jury rendered a verdict for the defendant upon which the court entered judgment.

The defense relied on was that the transactions out of which the alleged indebtedness arose were in violation of chapter 38, section 120 of the Criminal Code of the State of Illinois.

The only testimony in the case was given on behalf of the plaintiffs by Clarence J. Munford. He testified that he had been a member of the Chicago Board of Trade for about 30 years; that one defendant, Donaldson, who prior to these transactions had dealt with the plaintiffs, called one day at plaintiffs' office and left a check for $500.00 with the bookkeeper and thereafter gave several orders to buy and sell corn and oats which plaintiffs did; that each sale was made at a profit; that later by defendant's order plaintiffs bought for him 250 barrels mess pork at $17.02½, which trade resulted in a loss of

$144.61, including commissions and government war tax.

He testified that all the trades were made in behalf of the defendant in accordance with the rules of the Board of Trade; that the corn was in one of the elevators in Chicago; that defendant did not get a warehouse certificate for it because it was not held long enough; that they purchased all the corn from the Board of Trade brokers and had margins up with them for each trade, probably four or five cents per bushel; that the pork was sold and purchased in a similar way; that they received no warehouse receipt for it at the time it was purchased; that plaintiff talked with defendant while he was carrying the corn and also about the mess pork and defendant told the witness that he had been trading in corn on the Board of Trade. He did not say anything about deliveries and the witness did not remember saying anything to defendant about them, but the property bought would have been delivered had defendant held it until the contract time. If the market on the corn had declined enough to take his $500, plaintiffs would have closed out the trade, or else would have called for a margin and had he closed it out before the time of delivery, there would have been no delivery. He further testified that all grain purchased for future delivery is delivered during the contract month by warehouse receipt; that defendant did not hold it until the contract expired, and that was the reason why plaintiffs had no warehouse receipts for defendant's purchases.

The court instructed the jury orally, and against objection by plaintiff read to the jury said section 130, chapter 38 as the law applying to the case.

We think this was error. There was no evidence

$144.61, including commissions and government war tax.

He testified that all the trades were made in behalf of the defendant in accordance with the rules of the Board of Trade; that he was in one of the elevators in Chicago; that defendant did not get a warehouse certificate for it because it was not held long enough; that they purchased it from the Board of Trade brokers and had anything up with them for each trade, probably four or five cents per bushel; that the pork was sold and purchased in a similar way. That they received no warehouse receipt for it at the time it was purchased. That plaintiff talked with defendant while he was carrying the corn and also about the mess work and defendant told the witness that he had been trading in corn on the Board of Trade. He did not say anything about deliveries and the witness did not remember having anything to defendant about them, but the property bought would have been delivered had defendant held it until the contract time. If the market on the corn had declined enough to take his $800, plaintiff would have closed out the trade, or else would have called for a margin and had he closed it out before the time of delivery, there would have been no delivery. He further testified that all grain purchased for future delivery is delivered during the contract month by warehouse receipt; that defendant did not hold it until the contract expired, and that was the reason why plaintiff had no warehouse receipts for defendant's purchases.

The court instructed the jury orally, and against objection by plaintiff read to the jury subsection 1[illegible], chapter 38 as the law applying to the case.

We think this was error. There was no evidence

in the record from which the jury could find that it was the intention of the parties to these transactions that deliveries of the goods bought should not in fact be made.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

in the record from which the jury could find that it was the intention of the parties to those transactions that deliveries of the goods bought should not in fact be made.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

394 - 23739

212 I.A. 658

FLORA TAYLOR,
Appellee,

vs.

HUGH E. WHITNEY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellee, sued for money claimed to be due to her for commissions on the sale of a house and lot. She alleged she had been employed by the defendant as his special agent to sell the property and that she had secured a purchaser; that the defendant agreed to pay her the usual commission of 2½ per cent and she claimed $118.75 as due to her.

The affidavit of merits denied that this or any other sum was due the plaintiff; denied that defendant employed her as his agent to sell the property and denied that she had secured a purchaser, or that he had agreed to pay the commission. The case was tried by the court and plaintiff had judgment.

Defendant was engaged in the real estate business as a member of the copartnership of Whitney & Ford. Plaintiff called up Whitney & Ford and talked with both members of the firm with reference to the transaction. Whatever contract she had was with said copartnership. While on many points there is a conflict in the evidence, we think it is clearly established that the liability, if any to plaintiff, was that of Whitney & Ford, as copartners and not that of appellant individually. It was therefore necessary that the plaintiff should implead Ford with Whitney before she could recover, and it was error for the court to enter judgment against appellant alone. Page v. Brant, 18 Ill. 37; Sherburne v. Hyde, 185 Ill. 584.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

[illegible] - 1750

[illegible] Appellee,

vs.

[illegible] E. Wilsey,

[illegible]

Mr. Justice [illegible]

[illegible]

to her for [illegible]

alleged she had been employed by [illegible]

agent to sell the property [illegible]

that the defendant made [illegible]

per cent [illegible]

The affidavit [illegible]

sum was due [illegible]

as his agent to [illegible]

a purchaser, or [illegible]

case was tried by [illegible]

Defendant [illegible]

a member [illegible]

collect or [illegible]

firm with [illegible]

was with [illegible]

filed in the [illegible]

liability, [illegible]

contracts [illegible]

therefore [illegible]

history [illegible]

to enter judgment [illegible]

37; Montgomery v. [illegible]

The judgment will [illegible]

REVERSED AND REMANDED.

405 - 23750

212 I.A. 658

JAMES S. KNIGHT, Appellee,

vs.

J. COHEN, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Judgment was entered in the Municipal Court of Chicago against appellant for rent under power of attorney contained in a written lease. This judgment was set aside upon affidavit of defendant.

By instruction of the court the jury returned a verdict for plaintiff for $157.03 and ordered that the judgment theretofore entered stand. On this verdict the court entered judgment.

It is first contended that there is a variance between the lease offered in evidence and the one set up in the statement of claim. A general objection was made to the introduction of the lease in evidence, but not on the ground of variance. That question was not raised in the trial court and cannot be raised here for the first time. Jaeger v. U. S. Brewing Co., 163 Ill. App. 216.

It is next claimed that proof that the rent reserved in the lease had not been paid was insufficient. The affidavit of merits did not allege payment of the rent. The written lease was prima facie evidence of the amount due and there was no proof of payment. There is no merit to this point. Scott v. Mantonya, 60 Ill. App. 481.

It is next argued that because an assignment

405 - 23750

JAMES S. WRIGHT,
Appellee,

vs.

J. COHEN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MACNEALY DELIVERED THE OPINION OF THE COURT.

Judgment was entered in the municipal court of Chicago against appellant for rent under terms of a lease contained in a written lease. This judgment was set aside upon affidavit of defendant.

By instruction of the court the jury returned a verdict for plaintiff for $187.03 and ordered that the judgment theretofore entered stand. On this verdict the court entered judgment.

It is first contended that there is a variance between the lease alleged in evidence and the one set up in the statement of claim. A general objection was made to the introduction of the lease in evidence, but not on the ground of variance. This question was not raised in the trial court and cannot be raised here for the first time. Teeter v. D. & Buckley Co., 165 Ill. App. 218.

It is next claimed that proof that the rent reserved in the lease had not been paid was insufficient. The affidavit of merits did not allege payment of the rent. The written lease was prima facie evidence of the amount due and there was no proof of payment. There is no merit to this point. Scott v. Hutchins, 87 Ill. App. 481.

It is next urged that because of assignment

of the lease had been made the defendant was liable thereon only as a guarantor, and the assignment had the effect of rescinding and revoking the power of attorney contained in the lease to enter judgment by confession. The case of Jaeger v. U. S. Brewing Co., 163 Ill. App. 216, already cited is conclusive against the appellant on this point.

The appeal is without merit and the judgment will be affirmed.

AFFIRMED.

of the lease had been made the defendant was liable thereon only as a guarantor, and the assignment had the effect of rescinding and revoking the power of attorney contained in the lease to enter judgment by confession. The case of Jaeger v. U. S. Brewing Co., 165 Ill. App. 216, already cited in conclusive against the appellant on this point.

The appeal is without merit and the judgment will be affirmed.

AFFIRMED.

438 - 23783

212 I.A. 659

ANNIE HAGERTY,
Appellee,

vs.

PATRICK HAGERTY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Patrick Hagerty from an order of the Circuit Court of Cook County by which he was committed to the common jail of Cook County for failure to comply with an order of the court theretofore entered which directed him to pay temporary alimony to his wife.

Appellant first contends that the order should be reversed because the evidence on which the original order for alimony and the rule to show cause were entered is not preserved. The first order is not appealed from and the second is not an appealable order. A petition for the rule appears in the record which was sufficient basis for the rule. There is no merit to these contentions.

Appellant next contends that his answer to the rule to show cause proved his inability to comply with the order and that he should have been discharged on such answer.

The answer showed appellant worked for the city of Chicago and received therefor a salary of $98.00 per month; that he had other income from property, making a total income of $135.00 per month. The alimony was $8.00 per week and he was in arrears $116.00.

438 - 25783

AMNIE HAGGARTY,
Appellee,

va.

PATRICK HAGGARTY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE HAGGERTY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Patrick Haggarty from an order of the Circuit Court of Cook County by which he was committed to the County Jail of Cook County for failure to comply with an order of the court theretofore entered which directed him to pay temporary alimony to his wife.

Appellant first contends that the order should be reversed because the evidence in the record does not support order for alimony and the rule to show cause were entered in not preserve. The first order is not appealable from and the second is an appealable order. A petition for the rule appears in the record without affidavit basis for the rule. There is a part to these contentions.

Appellant's second contention is answer to the rule [illegible] showed his inability to comply with the order [illegible] have been [illegible] on such answer.

[illegible] of [illegible] receive [illegible] salary or [illegible] per month; that he had other income from property, making a total income of $[illegible] per month. The alimony was [illegible] per week and he was in arrears $[illegible].

We think on this answer the court was justified in finding that he was able to pay and that his failure to do so constituted contempt.

It is next contended that the order of commitment is conditional and decisions are cited to the effect that such orders are not good. We have examined the order and think it is absolute. It will be affirmed.

AFFIRMED.

We think on this answer the court was justified in finding that he was able to pay and that his failure to do so constituted contempt.

It is next contended that the order of commitment is conditional and declares, as cited to the effect that such orders are not good. We have examined the order and think it is absolute. It will be affirmed.

(AFFIRMED).

445 - 23790

212 I.A. 659

FANNIE LOFTUS, as administratrix of the estate of MICHAEL LOFTUS, deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant was defendant below and appeals to reverse a judgment for plaintiff in an action on the case for alleged negligence in the operation of its cars which resulted in the death of appellee's intestate. Said intestate was instantly killed by an eastbound street car operated by the servants of the defendant about 7:45 o'clock on the morning of April 11, 1914. The accident took place in Chicago on West Twelfth Boulevard, a street extending east and west at a point where Hoyne Avenue, a street extending north and south, runs into said boulevard.

Appellant accurately describes the situation thus, - "Twelfth street at this point is about 150 feet wide from building line to building line. On each side of the street is a sidewalk; the sidewalk on the south side of the boulevard is 13 feet 11 inches wide. Between the curb lines of the two sidewalks 12th street is divided into three roadways. The accident took place in the south one of these roadways. In the south roadway are the eastbound tracks. In the north roadway are the westbound street car tracks. The two tracks are about 76 feet apart. In this space of 76 feet lies the main 12th street boulevard, flanked on each side by park grass plots. The distance from the curb of the south sidewalk to the eastbound track was 18 feet 1 inch. * * * * Loftus walked north across

SUPPLIA 638

MARIE LOTTE, as administratrix [illegible]
of the estate of [illegible],
deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
A Public [illegible].

MR. JUSTICE [illegible]

Appellant [illegible] brought suit against [illegible] to recover a judgment for plaintiff in an action [illegible] negligence in the operation of [illegible] which resulted in the death of appellee's intestate. [illegible] instantly killed by an eastbound street car [illegible] the deceased about 7:45 o'clock on [illegible] evening of April 11, 1914. The accident took place [illegible] on Twelfth Boulevard, a street running [illegible] east and west [illegible] Hoyne Avenue, a street extending [illegible] said boulevard.

Appellant accurately describes the situation thus, - "Twelfth street at that point is [illegible] feet wide from building line to building line. [illegible] street is a roadway; [illegible] is 16 feet 11 inches [illegible] the [illegible] side of the roadway. The accident took place [illegible] south roadway and the [illegible] are the westbound street car [illegible] about 76 feet apart. In this [illegible] 12th street boulevard, [illegible] the distance from the north of the [illegible] track was 18 feet 1 inch. * * * [illegible] south across

that space of 18 feet 1 inch, before he reached the car track and during all the time that he was so walking north he had a clear and unobstructed view of the car coming from the west which struck him."

It was a double-truck, pay-as-you-enter car geared to run at a speed of about 17 or 18 miles an hour. The car was heavily loaded. It had on board between 140 and 160 passengers. It was the rush hour. At Ogden avenue two blocks west of the place where deceased met his death, another eastbound car was disabled and some of its passengers had been transferred to this car. West of Hoyne avenue and parallel thereto was Leavitt street. Although passengers there were waiting to board it, the car did not stop. It slackened up somewhat and the motorman observing that the way was clear, put on the power. It was the intention to do the same thing at Hoyne avenue at which place also several passengers were waiting to board the car. These passengers were standing on the south side of 12th street about a car length or less west of the east line of Hoyne avenue. As the car approached it slackened its speed, then the power was reapplied, and it moved eastward at a speed which the witnesses estimate all the way from 15 to 27 miles per hour. It struck deceased just as he was on the north rail of the track and threw him some distance in a northeasterly direction.

The declaration charged negligence in the rate of speed, in failing to sound the gong and in the general operation of the car. Defendant pleaded the general issue. Appellants argue that there was no evidence to establish negligence on the part of the defendant company, but we think that within the rule laid down in Devine v. Delano, 272 Ill. 179, and Kelly v. Chicago City Railway Co., 283 Ill. 640, there was evidence to go to the jury.

that there of it that I think,
and during all the time
a clear and substantial
which struck him.'

It was a [illegible]
to run [illegible] good [illegible]
was nearly in [illegible]
passengers. [illegible]
west of the [illegible]
car was diverted [illegible]
to this car. [illegible]
street. [illegible]
car did not stop. [illegible]
observing [illegible]
intending to [illegible]
several passengers [illegible]
were standing [illegible]
or less [illegible]
approached it [illegible]
and it [illegible]
all the [illegible]
as he was [illegible]
distance [illegible]

[illegible]
speed, in [illegible]
of the [illegible]
argument [illegible]
part of [illegible]
rule in [illegible]
Judge [illegible]
go to the jury.

The principal question is on the contention of appellant that plaintiff's intestate was guilty of contributory negligence. As bearing on that issue, one disputed matter of fact is whether the gong was sounded near to the place at which deceased was struck. We think a preponderance of the evidence indicates it was. It is undisputed that the deceased saw the car as it approached the place where he was about to cross. The ringing of the gong was, therefore, unimportant except as it might indicate to deceased that the car was about to cross the street without stopping. The controlling disputed matter of fact, we think, is "What was the distance between the car and the deceased at the time he started to cross the track?" If that distance was apparently such that with the car proceeding at the apparent rate of speed at which it was coming towards him, he could in the exercise of that degree of care and caution which a reasonably prudent person would exercise under such circumstances proceed to cross the track, then he was not guilty of contributory negligence. If the apparent distance of the car from him was such that a reasonable person situated as he was in the exercise of ordinary care would not have undertaken to cross the track, then he was guilty of such negligence. The evidence on this point is hopelessly conflicting.

One of plaintiff's witnesses stated that the apparent distance of the car from the deceased was 75 feet. A witness for the defendant stated that it was 4 feet and another 6 feet, which the physical facts in evidence show could not have been correct. Appellant says that the evidence indicates this distance to have been 15 to 30 feet. Appellee claims that it was from 50 to 75 feet. It is impossible to fix the distance with exactness. We think under the evidence it was for the jury to determine what the distance was, and whether or not the plaintiff was guilty of contributory negligence in attempting to cross.

The principal question is as to the conclusion of appellant that plaintiff's intestate was guilty of contributory negligence. As bearing on it I have, [illegible] fact is whether the [illegible] which deceased was struck. [illegible] evidence indicates it was. [illegible] deceased saw the car as it approached [illegible] cross. The finding of the [illegible] except as it might indicate [illegible] to cross the street without [illegible] matter of fact, [illegible] car and the deceased [illegible] It that distance [illegible] at the apparent rate of [illegible] he could in the exercise [illegible] which a reasonably [illegible] consideration preceed [illegible] contributory negligence. [illegible] him was such that [illegible] exercise of ordinary [illegible] track, then he was [illegible] point is [illegible].

[illegible] distance of the [illegible] the [illegible] the objectivity [illegible] Appellant [illegible] been in [illegible] fact. It is [illegible] think under the evidence [illegible] the distance was, [illegible] contributory negligence in [illegible].

Error is also assigned by the appellant upon an instruction given for the plaintiff as to ordinary care. The word "plaintiff" was evidently inadvertently used in the instruction for the word "deceased". The jury could not have been misled by this and the precise instruction, with the exception of this one word, has been approved in a similar case by the Supreme Court, Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267.

Error is also assigned on the alleged prejudicial misconduct of the plaintiff. The record shows that during the argument to the jury, the widow indulged in weeping in the presence of the jury while the judge was momentarily off the bench. A motion was made to withdraw a juror for this reason which was denied by the court. We think it was within the court's discretion so to rule. The judgment will be affirmed.

AFFIRMED.

Error is also assigned by the appellant upon an instruction given for the plaintiff as to contributory fault. The word "plaintiff" was evidently inadvertently used in the instruction for the word "defendant". The jury must have been misled by this and the previous instruction, after the exception of this one word, was been approved in a similar case by the supreme court. Hudson v. R. R. Co., 2 Mo. App. 207 III. 307.

Error is also assigned on the ruling in judging the misconduct of the plaintiff. The words above the line the argument to the jury, the plaintiff engaged in fighting in the presence of the jury while the jury were deliberating off the bench. A motion was made to withdraw a juror for that reason which was denied by the court. We think it was within the court's discretion so to rule. [illegible]

[illegible]

454 - 23799

212 I.A. 659

REID-MURDOCH & COMPANY,
a corporation,
Appellee,

vs.

S. E. TAYLOR and H. KABAKER,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellee, Reid Murdoch & Company, sued appellants upon a writing whereby appellants guaranteed absolutely the payment of an account due appellee from Morris Taylor & Company, a copartnership.

At the time the guarantee was given the debtors conducted two stores, one at Kolze and the other at Bensonville, Illinois. The appellee had accounts with both stores, but the account with the store at Kolze was the one guaranteed.

On January 12, 1916, the Kolze store was damaged by fire. Morris Taylor & Company assigned to one C. J. Becker, as trustee, and for the benefit of all their creditors, certain insurance policies covering the losses.

This assignment contained no provision that the acceptance thereof by creditors should release the debtors from further liability. At this time there was due to appellee, Reid Murdoch & Company, $298.22 on the Kolze account, and $154.59 on the Bensonville account. Both these accounts were filed with the trustee and the dividend of 38.8 per cent received on them. This left a balance of $182.51 unpaid on the Kolze account.

454 - 25799

REID-MURDOCH & COMPANY,
a corporation,
appellee,

vs.

S. E. TAYLOR and H. LANGER,
appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The appellee, Reid Murdoch & Company, sued appellants upon a written, unconditional guaranteed absolutely the payment of an account due appellee from Morris Taylor & Company, a copartnership.

At the time the guarantee was given the debtors conducted two stores, one at Moline and the other at Henssonville, Illinois. The appellee had accounts with both stores, but the account with the store at Moline was the one guaranteed.

On January 1, 1916, the Moline store was damaged by fire. Morris Taylor & Company assigned to one G. J. Hacker, as trustee, and for the benefit of all their creditors, certain insurance policies covering the losses.

This assignment contained no provision that the acceptance thereof by the trustee should release the debtors from further liability. At the time there was due to appellee, Reid Murdoch & Company, $2808.92 on the Moline account, and $1[illegible].00 on the Hensonville account. Both these accounts were filled with the trustee and the dividend of 38.8 per cent received on them. This left a balance of $1[illegible].81 on the Moline account.

On September 13, 1916, a statement of his trusteeship was mailed by the trustee to appellee with a check for $170.41, representing the dividends on both the Kolze and Bensonville accounts. Upon the back of this check was stamped the following endorsement, "This check when endorsed is acceptance of 38.8% in full settlement of any and all claims against Elisohn & Taylor trading as Peoples Market and Grocery, and releases C. J. Becker, Trustee from any and all liability under Trusteeship." Appellee cashed this check.

Appellants claim that the acceptance of this check released the debtors and therefore the guarantors, and that the court erred in that it admitted evidence to vary and explain the endorsement on the back of the check.

If the debtors were in fact released, the guarantors would also be released. Trotter v. Strong, 63 Ill. 272, but we do not think the acceptance of this check effected a release of the debtors. The original assignment made no provision that its acceptance should have such an effect and the creditor in so far as that instrument was concerned, would, therefore, be free to collect the remainder of the debt. Howlett v. Mills, 22 Ill. 341; Hammond v. Pinkham, 149 Mass. 356.

There being no dispute as to the amount which was actually due the creditor even had appellee agreed to take a less sum in full satisfaction of the debt, it would not be binding unless there was a new consideration or a release under seal. Hayes v. Mass. Mutual Life Ins. Co., 125 Ill. 626; Farmers & Mechanics Life Association v.

On September 13, 1916, a statement of his trusteeship was mailed by the trustee to appellee with a check for $170.41, representing the dividends on both the Kelso and Bensonville accounts. Upon the back of this check was stamped the following endorsement, "This check when endorsed is acceptance of 38.5% in full settlement of any and all claims against Wilson & Taylor trading as People's Market and Grocery, and releases C. J. Becker, Trustee from any and all liability under Trusteeship." Appellee cashed this check.

Appellants claim that the acceptance of this check released the debtors and therefore the guarantors, and that the court erred in that it admitted evidence to vary and explain the endorsement on the back of the check.

If the debtors were in fact released, the guarantors would also be released. Trotter v. Strong, 6 Ill. 272, but we do not think the acceptance of this check effected a release of the debtors. The original assignment made no provision that the acceptance of it would have such an effect and the creditor in so far as that instrument was concerned, would, therefore, be free to collect the remainder of the debt. Howlett v. Willis, 24 Ill. 341; Hammond v. Pinkham, 148 Mass. 376.

There being no dispute as to the amount which was actually due the creditor even had creditor agreed to take a less sum in full satisfaction of the debt, it would not be binding unless there was a new consideration or a release under seal. Hayes v. Hess. Mutual Life Ins. Co., 128 Ill. 626; Farmers & Merchants Life Association v.

Caine, 224 Ill. 599.

Moreover, we do not think the court erred in receiving oral evidence tending to explain the receipt stamped on the back of the check. Ditch, Admr. v. Vollhardt, 82 Ill. 134. This evidence showed it was not the intention of the parties to release the debtors.

The judgment will be affirmed.

AFFIRMED.

Quine, 224 Ill. 599.

Moreover, we do not think the court erred in receiving oral evidence tending to explain the receipt stamped on the back of the check. Ditch, Adm. v. Vollhardt, 82 Ill. 124. This evidence showed it was not the intention of the parties to release the debtors.

The judgment will be affirmed.

AFFIRMED.

460 - 23805

212 I.A. 659

CHICAGO WASTE COMPANY, a corporation,
Appellant,

vs.

CHARLES T. WEINSHENKER,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for $223.95, balance as claimed for goods sold and delivered, and from a judgment on finding by the court for $136.63, appeals.

The goods in question were thirteen bales of cotton waste which plaintiff by its broker, one Dixon, sold to defendant by sample. Defendant upon delivery claimed that the goods were not equal to the sample and Dixon told defendant to use as much of them as he could and that the plaintiff would take back the unused portion, giving defendant credit therefor. Defendant was to notify plaintiff when the unused portion was ready to take away.

The goods were sent by defendant to the Garfield Sanitary Felt Company to be carded, and thereafter plaintiff was notified to call and get the unused portion. This plaintiff did, weighed it and found the amount returned to be 157 pounds for which plaintiff gave credit at the agreed price amounting to $5.39, leaving a balance due as claimed.

Defendant claims that there was much more dirt and waste which was dumped out and that he should receive a further credit therefor, - how much, if any there was of this, - there is no proof in the record.

Defendant could have weighed the unused portion

212143.559

450 - 23805

CHICAGO WASTE COMPANY, a corporation,
Appellant,

vs.

CHARLES T. WEINSHENKER,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued for $223.32, claiming as claimed for goods sold and delivered, and from a judgment on finding by the court for $125.65, appeals.

The goods in question were bitumen balls of cotton waste which plaintiff by its bookkeeper, one Dixon, sold to defendant by sample. Defendant upon delivery claimed that the goods were not equal to the sample and Dixon told defendant to use as much of them as he could and that the plaintiff would take back the unused portion, giving defendant credit therefor. Dixon at was to notify plaintiff when the unused portion was ready to take away.

The goods were sent by defendant to the Fairfield Sanitary Felt Company to be carded, and thereafter plaintiff was notified to call and get the unused portion. The plaintiff did, weighed it and found the amount returned to be 187 pounds for which plaintiff gave credit at the agreed price amounting to $5.55, leaving a balance due as claimed.

Defendant claims that there was much dirt and waste which was charged and was that he should have a further credit therefor, - how much, if any there is of this, - there is no proof in the record.

Defendant could have weighed the unused portion

of the goods if he so desired. He is only entitled to credit for the amount which the evidence shows that he in fact returned. The court should have made a finding and entered judgment for the full amount of plaintiff's claim.

The judgment will be reversed and judgment entered here for the amount due $223.95.

REVERSED WITH JUDGMENT HERE.

of the goods if he so desired. He is only entitled to credit for the amount which the evidence shows that he in fact returned. The court should have made a finding and entered judgment for the full amount of plaintiff's claim.

The judgment will be reversed and judgment entered here for the amount due $625.98.

REVERSED WITH JUDGMENT HERE.

460 - 23805

FINDING OF FACTS.

The court finds as a matter of fact that the appellant in this case sued for goods sold and delivered to the appellee; that at the time the said goods were delivered it was claimed by appellee that they were not equal to the sample by which they were sold, and that thereupon appellant and appellee agreed that appellee would keep the goods and return to the appellant the unused portion thereof, receiving credit therefor at the agreed price; that only 157 pounds of said goods were returned by appellee to appellant and that appellee received a credit therefor amounting to $5.39; that there is due to the appellant from the appellee on account of the goods so sold and delivered a balance of $223.95.

FINDING OF FACTS.

The court finds as a matter of fact that the appellant in this case sued for goods sold and delivered to the appellee; that at the time the said goods were delivered it was claimed by appellee that they were not equal to the sample by which they were sold, and that thereupon appellant and appellee agreed that appellee would keep the goods and return to the appellant the unused portion thereof, receiving credit therefor at the agreed price; that only 157 pounds of said goods were returned by appellee to appellant and that appellee received a credit therefor amounting to $3.35; that there is due to the appellant from the appellee on account of the goods so sold and delivered a balance of $223.95.

478 - 23823

212 I.A. 659

WILMER T. CULVER, Trustee of the estate of LUDINGTON MFG. COMPANY, bankrupt,
Appellant,

vs.

AETNA STATE BANK, a corporation, and CHARLES B. LITTLE,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree which dismissed his bill for want of equity.

Appellant is trustee in bankruptcy of the Ludington Manufacturing Company. The petition against the bankrupt was filed January 27, 1914; order of adjudication was entered on February 5th, and appellant was elected trustee April 3rd, thereafter.

The bill charged collusion, conspiracy and fraud against appellees, together with one Rath, president of the bankrupt company, by means whereof certain property of the bankrupt was transferred to Little with the intention to defraud the creditors, and under circumstances constituting a preference under the provisions of the bankruptcy law. The property in controversy is the balance of an account with the Aetna State Bank which the decree finds amounted to $550.02, also $3045.00 paid by Little to the Aetna State Bank about the time of adjudication, and 80 shares of the common stock of the North American Timber Holding Company. The bill prayed that the transfers might be set aside and the trustee decreed to be the owner of the property.

There is little conflict in the evidence on points

material and important. The bankrupt was a corporation organized under the laws of the state of Illinois, which maintained an office in Chicago and owned and operated a factory at Ludington, Michigan. Its principal business was making and selling electric player pianos. On December 31, 1913, the company through Rath, sold to appellee, Charles B. Little, sixteen of these pianos and in payment therefor, received these eighty shares of the common stock of the North American Timber Holding Company. Rath represented that the corporation was worth at least $50,000 and we think there is no evidence that appellees had any reason at that time to suspect its insolvency, nor is there proof in the record that it was in fact insolvent at that time.

Two contracts were executed by the terms whereof the company agreed to keep the pianos in order, make collections therefrom and guaranteed an income of $10.00 per month from each of them. The name of Little, indicating that he was the owner, was to be put upon a steel plate and fastened to each piano sold to him.

As a part of the transaction, Little who was a director of the defendant, Aetna State Bank, together with Rath, negotiated a loan of $3000 from the bank in behalf of the company. Rath executed a promissory note of the same date representing this loan. The note was drawn to Rath's order and endorsed by Rath and the Ludington Manufacturing Company. It drew interest at the rate of six per cent per annum and was payable March 31, 1914. As collateral to said note, the eighty shares of the stock of the North American Timber Holding Company were deposited with the bank. Little by a separate instrument in writing guaranteed the payment of said note and interest thereon. The guaranty stated, "This guaranty is given with the understanding that the securities accompanying this note shall be turned over to me in the event of my paying the same."

It was also agreed between the parties that the proceeds of the loan should be deposited in the bank, but that said proceeds should be withdrawn only upon the order of Little as pianos were fr time to time delivered to him. As these deliveries were made from time to time, Little was to notify the bank to release a proportions amount of the deposit. On January 29th, 1914, only twelve of the pianos had been delivered and there remained in the account the sum of $550.02. Rath notified the bank and Little that the company coul not complete its contract to deliver the remainder of the pianos and that Little was entitled to the balance. Thereupon the bank closed the account by withdrawing this balance and placing it in the form of a draft on the Central Trust Company of Illinois, payable to the order of its own cashier. This was done pending the determination of the application to be made of it.

When the note fell due March 31st, Little gave the bank a renewal note of one A. G. Johnson for the sum of $3000 which a few days afterwards was paid in full by Little. The balance of the account was then transferred to an account in Little's name, and $45.00 interest on the original note and $15.00 interest on the renewal note were charged against it. Upon payment by Little of the Johnson note, the original note with the North American Timber Molding Company stock attached thereto was delivered to Little. The decree finds that the "notice to defendants of said bankruptcy and adjudication was not proven to the satisfaction of the court, and the court does not credit the testimony * * * to the effect that he had advised the defendant, Aetna State Bank, of the bankruptcy of the Ludington Manufacturing Company." Appellant contends that this finding is contrary to the weight of the evidence. We do not think so, but think it immaterial whether the defendants did, or did not have such notice.

We are not able to discover in this transaction collusion or fraud by which the property of the bankrupt was placed out of

It was also agreed between the parties that the proceeds of the loan should be deposited in [illegible], but [illegible] proceeds should be withdrawn only upon the [illegible] pianos were from time to time delivered to him. As [illegible] were made from time to time, little was to notify the [illegible] remaining a proportional amount of the deposit. On January 29th, 1921, only twelve of the pianos had been delivered and [illegible] in the [illegible] the sum of $850.00. Each monthly [illegible] and little [illegible] company could not complete its contract to deliver the remaining [illegible] pianos and that little was entitled to the balance. [illegible] closed the case out by withdrawing the [illegible] leaving it to [illegible] of a draft on the general [illegible] company, payable to the order of its own manager. [illegible] determination of the application to the [illegible] of it.

Then the [illegible] the bank a renewal note of [illegible] Johnson [illegible] a few days afterwards [illegible] the balance of the account was then [illegible] and $48.00 interest on the original [illegible] on the renewal note were [illegible] little of the Johnson note, the original note [illegible] Lumber Holding company [illegible] to [illegible] deere time. That the [illegible] and adjudication was not [illegible] the court does not [illegible] had advised the [illegible] of the Washington Manufacturing company." [illegible] finding is contrary to the [illegible] think so, but think it [illegible] or it not have been notice.

We are not able to discover in this [illegible] solution or fraud by which the property of the bankrupt was placed out of

the reach of its creditors. There is no proof that the consideration for the transfer of the pianos was inadequate; that the collateral exceeded in value the amount which Little was compelled to pay upon his guarantee; or that the estate of the bankrupt was in any way impoverished by the transaction. The stock was tendered in court and an opportunity given the trustee to redeem it which he did not accept. He who seeks equity, must do equity. The bank upon the maturity of the note had a right to apply the amount of the bankrupt's deposit upon the indebtedness due upon the note. New York County National Bank v. Massey, 192 U. S. 138; Studley v. Boylston National Bank, 229 U. S. 523; U. S. Bankruptcy Act, Sec. 68a. Neither Little nor the bank filed any claim against the estate of the bankrupt and in this situation the bank had a right to realize upon its security in pursuance of the contract originally made. In Re Goldsmith, 118 Fed. 763. By so doing it would not be receiving a preference within the meaning of the Bankruptcy Act. (See sections 16, 60, 67 and 68, U. S. Bankpruptcy Act.)

Appellant insists that the court erred in refusing to receive proper evidence offered by the complainant, but if we are correct in the views heretofore expressed, the offered evidence was wholly immaterial. Appellant also argues that the decree is erroneous because it grants affirmative relief on an answer in the absence of a cross bill, or prayer in the answer that it be taken as a cross bill. We have examined the decree and do not think it is subject to this objection. It contained a provision for appellant's benefit of which he did not avail himself and cannot complain. It granted no affirmative relief to appellees. The decree will be affirmed.

AFFIRMED.

the reach of its creditors. [illegible]
alternative for the [illegible]
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compelled to [illegible]
bankrupt [illegible] stock
was tendered [illegible] to [illegible]
it which he [illegible]
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the [illegible]
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514 - 23859

212 I.A. 660

T. B. WOOD,
Appellant,

vs.

F. JOHNSON & COMPANY,
a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree of the Circuit Court of Cook County which granted in part a permanent injunction prayed for in the complainant's bill.

The bill recites that the cause came on for hearing upon the bill and answer and replication, and the proofs oral, documentary and written taken in said cause.

The certificate of evidence has for good reason heretofore been stricken. There are no findings of fact in the decree.

Appellant has asked that the decree be reversed and appellee has assigned cross errors on account of which he has also asked that the decree be reversed.

As the decree grants affirmative relief to complainant and there is neither certificate of evidence, nor findings of fact from which we can determine that the decree was proper, we are able to comply with the request of both parties. Van Meter v. Malchef, 276 Ill. 451.

The decree will be reversed and the cause remanded.

REVERSED AND REMANDED.

155

SIA - 23885

212 I.A. 660

T. H. WOOD,
Appellant,

vs.

T. JOHNSON & COMPANY,
a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from a decree of the Circuit Court of Cook County which granted in part a permanent injunction prayed for in the complainant's bill.

The bill recites that the cause came on for hearing upon the bill and answer and replication, and the proofs oral, documentary and written taken in said cause.

The certificate of evidence as for good reason heretofore been stricken. There are no findings of fact in the decree.

Appellant has asked that the decree be reversed and appellee has assigned cross errors on account of which he has also asked that the decree be reversed.

As the decree grants affirmative relief to complainant and there is neither certificate of evidence, nor findings of fact from which we can determine that the decree was proper, we are unable to comply with the request of both parties. Van Antwerp v. Mitchell, 270 Ill. 481.

The decree will be reversed and the cause remanded.

REVERSED AND REMANDED.

526 - 23871

212 I.A. 660

JAMES PETERSON,
Appellee,

vs.

IRIS THEATRE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered by the Municipal Court upon trial without a jury.

The original statement of claim stated a supposed cause of action upon two promissory notes alleged to have been executed by the defendant to the order of "themselves", but it did not show that these notes had been endorsed.

When the case was called for trial on motion of plaintiff leave was given and an amended statement of claim filed. The amended statement alleged endorsement of the notes by the makers thereof.

The defendant moved for a continuance on the ground of surprise which the court denied unless counsel for defendant would state there was an absolute defense to the amended statement of claim. Neither the defendant himself, nor his witnesses were in court, but the trial was ordered to proceed.

The notes were received in evidence and the amount due thereon computed. It appeared that the consideration for them was rent past due.

It is argued here that as the amendment went to a matter of substance, the court erred in summarily ordering the case tried. If the record showed an affidavit as required by the statute, or a request to the court for

JAMES PETERSON,
Appellee,

vs.

MAIN THEATRE COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT:

The defendant appeals from a judgment entered by the Municipal Court upon a verdict in favor of plaintiff.

The original complaint in this action contained a separate cause of action by a co-partnership under allegations it had been excluded [illegible] "Thespian", but it did not [illegible] concerned.

[illegible] motion of plaintiff [illegible] of claim filed. The amended complaint [illegible] of the notes by the [illegible].

The [illegible] on the ground of corporate [illegible] denied [illegible] or defendant would [illegible] the amended statement [illegible] "[illegible]", nor his [illegible] to proceed.

The notes [illegible] amount due [illegible] adversion [illegible].

It is argued [illegible] to a matter of [illegible] ordering the case [illegible] as required by the statute, or a request to the court for

time to prepare such an affidavit, we think the contention would be good, but no such request was made and no such affidavit filed.

In the absence of this we think the contention of appellant cannot be sustained. The Chi. & Pac. R. R. Co. v. Stein, et al., 75 Ill. 41; The Litchfield Coal Co. v. Taylor, 81 Ill. 590.

For the reasons indicated the judgment will be affirmed.

AFFIRMED.

time to prepare such an affidavit, as [illegible] the contribution would be good, but no such request was [illegible] such affidavit filed.

In the absence of this we think the contribution of appellant cannot be sustained. The Del. & Hud. [illegible] Co. v. Storm, et al., 75 Ill. 41; The Mitchell Coal Co. v. Taylor, 81 Ill. 390.

For the reasons indicated the judgment will be affirmed.

AFFIRMED.

563 - 23908

212 I.A. 660

IDA ROSS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered upon the verdict of the jury in an action on the case for personal injuries.

The accident out of which the suit arose occurred on Milwaukee avenue in the city of Chicago, near its intersection with North 44th avenue.

The plaintiff was riding in an automobile which was being driven by her son, and there was a collision between this automobile and a street car operated by the servants of defendant.

The declaration at the time the case was submitted to the jury consisted of a single count which alleged that defendant negligently managed and controlled the car, etc. thereby causing the collision by which plaintiff, while exercising due care, was injured.

Appellant has argued here that the verdict is against the manifest weight of the evidence, but we think the case was clearly one for the jury.

A more serious question is raised as to instructions given the jury at the request of the plaintiff.

Instruction No. 17 was as follows: "If you

563 - 23908

IDA ROSS,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

SIZ I.A. 660

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered upon the verdict of the jury in an action on the case for personal injuries.

The accident out of which the instant case occurred on Milwaukee avenue in the city of Chicago, near its intersection with North Ashland avenue.

The plaintiff was riding in an automobile which was being driven by her son, and there was a collision between this automobile and a street car owned by the servants of defendant.

The declaration at the time the case was submitted to the jury consisted of a single count which alleged that defendant negligently managed and controlled the car, etc. thereby causing the car to injure the plaintiff, while exercising due care, was injured.

Appellant has argued from that the verdict is against the manifest weight of the evidence, but we think the case was properly submitted to the jury.

A more serious question is raised as to instructions given the jury at the request of the plaintiff.

Instruction No. IV was as follows: "If you

find from the evidence and under the instructions of the court in this case that the plaintiff, while in the exercise of ordinary care for her own safety, was injured as alleged in her declaration, then you may find the defendant guilty."

As this instruction directed a verdict, it was necessary that it should state every essential element which it was necessary for the plaintiff to prove in order to recover. The gist of the action was negligence. This instruction says nothing about that, but tells the jury that if the plaintiff in the exercise of ordinary care was injured as alleged in her declaration, the jury might find the defendant guilty.

Appellee argues that as the instruction refers the jury to the declaration which charges negligence, it in fact advised the jury that negligence must be proved in order to recover.

We do not think so. The case of Jones v. Sampsell, 148 Ill. App. 158, passed upon this point in the discussion of a similar instruction the giving of which was there held to be reversible error. We think the cases cannot be distinguished.

Other errors are alleged, but it will not be necessary to consider them. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

find from the evidence and on or the instructions of the court in this case that the plaintiff, while in the exercise of ordinary care for her own safety, was injured as alleged in her declaration, then you may find the defendant guilty."

As this instruction directed a verdict, it was necessary that it should state every essential element which it was necessary for the plaintiff to prove in order to recover. The gist of the action was negligence. This instruction says nothing about that, but tells the jury that if the plaintiff in the exercise of ordinary care was injured as alleged in her declaration, the jury might find the defendant guilty.

Appellee argues that as the instruction refers the jury to the declaration which charges negligence, it in fact advised the jury that negligence must be proved in order to recover.

We do not think so. The case of Jones v. Sampsell, 148 Ill. App. 188, passed upon this point in the discussion of a similar instruction and on was there held to be reversible error. We think the same cannot be distinguished.

Other errors are alleged, but it will not be necessary to consider them. The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

582 - 23927

212 I.A. 660

CHARLES H. JOHNSON,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered upon the verdict of a jury in an action on the case.

It is argued that the evidence failed to prove either ordinary care for his own safety by the plaintiff, or negligence on the part of the defendant.

The evidence tended to prove the following facts. The plaintiff on July 22, 1913, at about 5:30 P. M. was riding on a motorcycle in a westerly direction on West North avenue in the city of Chicago between the north street car track and the curb. This street extended in an easterly and westerly direction and defendant operated two car tracks on it. The north track was used for west bound cars and the south track for east bound cars. Kedzie avenue extends north and south.

At the time in question one of the sprinkling cars of defendant was standing on the west bound track about two hundred feet west of the intersection of Kedzie avenue. A hose about four inches in diameter was attached to the car and was stretched across the street to a fire plug on the north curb of the street. The car and hose were in the control of the servants of the defendant who were at the point of coupling the hose to the fire plug at the time plaintiff approached.

502 - 25327

CHARLES H. JENNSON,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

912 I.A. 660

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered upon the verdict of a jury in an action on the case.

It is argued that the evidence failed to prove either ordinary care for his own safety by the plaintiff, or negligence on the part of the defendant.

The evidence tended to prove the following facts. The plaintiff on July 22, 1912, at about 5:30 P. M. was riding on a motorcycle in a westerly direction on West North avenue in the city of Chicago between the north street car track and the curb. This street extended in an easterly and westerly direction and defendant operated two car tracks on it. The north track was used for west bound cars and the south track for east bound cars. Kedzie avenue extends north and south.

At the time in question one of the sprinkling cars of defendant was standing on the west bound track about two hundred feet west of the intersection of Kedzie avenue. A hose about four inches in diameter was attached to the car and was stretched across the street to a fire plug on the north curb of the street. The car and hose were in the control of the servants of the defendant who were at the point of coupling the hose to the fire plug at the time plaintiff approached.

As plaintiff approached the hose, he slowed down and was about to cross over it when one Walsh, the servant of defendant in charge of the car, put out his hand and told plaintiff to go around the car and not run over the hose, and that if he did so, he, Walsh, would knock him over.

Plaintiff then turned to the south and drove his motorcycle behind the sprinkler and over to the south or east bound track where he was struck by an east bound car and severely injured.

Plaintiff at the time he was directed to go around the car could not see down the east bound track because of the sprinkler car in front of him, and he did not look to see if a car was coming prior to crossing to the south bound track.

No negligence was proved as to the management and control of the east bound car. It was running at a speed of about six or seven miles per hour and as it approached the sprinkler, the gong was sounded.

We do not understand that appellee contests the general rule as contended for by appellant that it is negligence for a person in passing behind a street car that necessarily obstructs his vision of another car approaching from an opposite direction on an adjacent parallel track to attempt to cross the latter track without looking to see whether there is a car so approaching when in the ordinary course of events one may be there. Devine, Admr. v. Chicago City Ry. Co., 203 Ill. App. 410; Brown v. Chicago City Ry. Co., 155 Ill. App. 434. But appellee contends that an invitation or assurance of safety given by a servant of the company operating the car may so qualify

As plaintiff approached the hose, he slowed down and was about to cross over it when one Walsh, the servant of defendant in charge of the car, put out his hand and told plaintiff to go around the car and not run over the hose, and that if he did so, he, Walsh, would break him over.

Plaintiff then turned to the south and drove his motorcycle behind the sprinkler and over to the south or east bound track where he was struck by an west bound car and severely injured.

Plaintiff at the time he was directed to go around the car could not see down the east bound track because of the sprinkler car in front of him, and he did not look to see if a car was coming prior to crossing to the south bound track.

No negligence was proved as to the management and control of the east bound car. It was running at a speed of about six or seven miles per hour and as it approached the sprinkler, the king was sounded.

We do not understand that appellee contests the general rule as contended for by appellant that it is negligence for a person in passing behind a street car that necessarily obstructs his vision of another car approaching from an opposite direction on an adjacent parallel track to attempt to cross the latter track without looking to see whether there is a car approaching when in the ordinary course of events one may be seen. Peering, Adam. v. Chicago City Ry. Co., 2 A. 123. App. Brown v. Chicago City Ry. Co., 188 Ill. App. 424. But appellee contends that an invitation or assurance or, strictly speaking, by a servant of the company operating the car may be qualify

a plaintiff's act as to relieve it of the quality of negligence which it otherwise would have had. B. & O. S. W. R. R. Co. v. Mullen, 217 Ill. 203; C. & A. R.R. Co. v. Winters, 175 Ill. 293.

We do not question the rule contended for by appellee, but do not think it can be applied to the particular facts in the instant case. The evidence does not show that the servant of defendant told plaintiff to pass behind the car without looking. Indeed, he had a right to presume that plaintiff in passing behind the car would use ordinary care to avoid injury. The servant of the defendant was not in a position from which he could see whether a car was approaching on the south or east bound track, and plaintiff saw Walsh's position and knew this to be a fact.

We think therefore the evidence shows that plaintiff was guilty of negligence contributing to his injury by reason of failure to look out for the approaching car on the south track before going upon it, which precludes his recovery.

The judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

a plaintiff's act as to relieve it of the quality of negligence which it otherwise would have had. B. & O. R. R. Co. v. Wallace, 217 Ill. 203; C. & A. R. R. Co. v. Winters, 175 Ill. 293.

We do not question the rule contended for by appellee, but do not think it can be applied to the particular facts in the instant case. The evidence does not show that the servant of defendant told plaintiff to pass behind the car without looking. Indeed, he had a right to presume that plaintiff in passing behind the car would use ordinary care to avoid injury. The record of the conversation was not in a position from which he could see whether a car was approaching on the north or south track, and plaintiff saw Walsh's position and knew it to be a fact.

We think therefore the evidence shows that plaintiff was guilty of negligence contributing to his injury by reason of failure to look out for the approaching car on the south track before going upon it, which precludes his recovery.

The judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

23927

FINDING OF FACT.

We find as a fact that the plaintiff in this action was guilty of negligence which proximately contributed to cause the injury for which he sues, and that he therefore cannot recover.

FINDING OF FACT.

We find as a fact that the plaintiff in this action was guilty of negligence which proximately contributed to cause the injury for which he sues, and that he therefore cannot recover.

374 - 23719

1354

212 I.A. 661

MARY HOGAN, a minor, by Anastasia Hogan, her mother and next friend, Appellee,	APPEAL FROM
vs.	CIRCUIT COURT,
CHARLES H. BOYER, Appellant.	COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, by her next friend, brought suit against the defendant for personal injuries. There was a verdict and judgment in her favor for $5,000 to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff at the time of the accident was a child four years and three months old. She lived with her mother and grandmother on the south side of Barry avenue, about midway between Broadway and Clark streets, in Chicago. Barry avenue extends east and west, and is intersected by the two streets mentioned. The distance from Broadway to Clark street is about twelve hundred feet, and no other street intersects Barry avenue between these two streets. This part of Barry avenue is a closely built up residence section of the city.

On the afternoon of April 2, 1915, some friends of plaintiff's mother drove up in an automobile and stopped in front of plaintiff's home. At the time, plaintiff's mother was not at home. Plaintiff's grandmother came out to the standing automobile, and while she was talking to the friends, plaintiff walked east on the south sidewalk

374 - 25719

MARY HOGAN, a minor, by Annastasia Hogan, her mother and next friend,
Appellee,

vs.

CHARLES H. BOYNE,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

131 A. 601

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, by her next friend, brought suit against the defendant for personal injuries. There was a verdict and judgment in her favor for 3,000 to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff at the time of the accident was a child four years and three months old. She lived with her mother and grandmother on the south side of Berry avenue, about midway between Broadway and Clark streets, in Chicago. Berry avenue extends east and west, and is intersected by the two streets mentioned. The distance from Broadway to Clark street is about twelve hundred feet, and no other street i[illegible] Berry avenue between these two streets. This [illegible] of Berry avenue is a closely built up residence section of the city.

On the afternoon of April 2, 1915, some friends of plaintiff's [illegible] in an automobile and stopped in front of plaintiff's home. At that time, plaintiff's mother was not at home. Plaintiff's grandmother came out to the standing automobile, and while she was talking to the friends, plaintiff walked east on the south sidewalk

to a point opposite where some other children were playing on the north side of the street. Plaintiff started to cross the street in a northeasterly direction towards the other children, when defendant's automobile, driven by his chauffeur, struck the plaintiff and injured her.

The evidence tends to show that the chauffeur was driving east from Clark street on the south side of the roadway of Barry avenue, which is thirty feet wide, bound for the defendant's home; that Barry avenue from Clark street east is down grade. The theory of plaintiff was that she started to cross Barry avenue to the north at a point variously stated by the witnesses to be from thirty-eight to one hundred feet east of the automobile standing in front of her home; that defendant's chauffeur was driving an automobile east at a speed of from twenty-five to thirty miles an hour, and without sounding a horn or giving any warning, he passed within a foot or two of the standing automobile, and the machine struck plaintiff about the middle of the roadway of the street; that the large bullseye fortified headlight came in contact with plaintiff and was shattered; that plaintiff was thrown through the air and the automobile ran beyond the place where plaintiff was struck about one hundred or one hundred and twenty-five feet before it was stopped. Plaintiff was placed in the automobile and taken to receive medical attention.

The defendant's theory was that the chauffeur was driving east on the south side of the roadway of Barry avenue at about fifteen miles per hour; that suddenly and without warning the child ran out into

to a point opposite where some other children were playing on the north side of the street. Plaintiff started to cross the street in a northeasterly direction towards the other children, when defendant's automobile, driven by his chauffeur, struck the plaintiff and injured her.

The evidence tends to show that the chauffeur was driving east from Clark street on the south side of the roadway of Barry avenue, which is thirty feet wide, bound for the defendant's home; that Barry avenue from Clark street east is 40 m grade. The theory of plaintiff was that she started to cross Barry avenue to the north at a point variously placed by the witnesses to be from thirty-eight to one hundred feet east of the automobile standing in front of her home; that defendant's chauffeur was driving an automobile east at a speed of from twenty-five to thirty miles an hour, and without sounding a horn or giving any warning, he passed within a foot or two of the standing automobile, and the moving struck plaintiff about the middle of the roadway on the street; that the large bulldog particular [illegible] in company with plaintiff and was [illegible]; the plaintiff was thrown through the air [illegible] the automobile and beyond the place where plaintiff was [illegible] one hundred or one hundred and twenty-five feet [illegible] and was injured. Plaintiff was placed in the automobile [illegible] to receive medical [illegible].

The defense to the theory was that the chauffeur was driving east on the south side of the roadway of Barry avenue at about fifteen miles per hour; that suddenly and without warning the child ran out into

the street just east of the standing automobile and in front of defendant's machine, and that he was unable to prevent the accident after he discovered the plaintiff's presence.

It would serve no useful purpose to analyze the testimony of the various witnesses, but we think it sufficient to say that we are clear that the jury were fully warranted in accepting plaintiff's version of the matter.

The defendant first argues that the accident happened as the result solely of the negligence of the child. What we have said disposes of this contention. Moreover, under the law in this state, a child four years and three months old is incapable of being guilty of negligence. Chicago City Ry. Co. v. Tuohy, 196 Ill. 410; Richardson v. Nelson, 221 Ill. 254.

It is next argued that the verdict is excessive; that plaintiff's injuries were not of such a serious nature as to warrant the amount of the verdict. The evidence tends to show that plaintiff's left collar bone was fractured and driven down against the musculospiral nerve, which supplies motion and feeling to the left arm; that the arm, wrist and fingers were permanently paralyzed, flexed, atrophied and disabled, so that the arm is from a half to three-quarters of an inch in circumference smaller and about an inch and a half shorter than the other arm, and that this difference will increase as the child grows older. The evidence further shows that her body in various parts was severely bruised, her head was cut and she was rendered unconscious; that as a result of the accident she is nervous, irritable, anaemic and underdeveloped. This

the street just east of the standing automobile and in front of defendant's machine, and that he was unable to prevent the accident after he discovered the plaintiff's presence.

It would serve no useful purpose to analyze the testimony of the various witnesses, but we think it sufficient to say that we are clear that the jury were fully warranted in accepting plaintiff's version of the matter.

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It is next argued that the verdict is excessive; that plaintiff's injuries were not of such a serious nature as to warrant the amount of the verdict. The evidence tends to show that plaintiff's left collar bone was fractured and driven down against the brachioepiral nerve, which supplies motion and feeling to the left arm; that the arm, wrist and fingers were permanently paralyzed, flexed, atrophied and disabled, so that the arm is from a half to three-quarters of an inch in circumference smaller and about an inch and a half shorter than the other arm, and that this difference will increase as the child grows older. The evidence further shows that her body in various parts was severely bruised, her head was cut and she was rendered unconscious; that as a result of the accident she is nervous, irritable, anemic and underdeveloped. This

appears not only from the testimony of the physicians who testified on behalf of the plaintiff, but to some extent from the testimony of the physicians who testified on behalf of the defendant. And it further appears from the testimony of Dr. Graham, who was appointed by the court at the challenge of defendant's counsel to plaintiff's counsel made during the progress of the trial, before the jury, that plaintiff be examined by an impartial physician. It is conceded by counsel for defendant that the injuries to plaintiff, according to the opinion of this physician, were more severe than shown bybthe testimony of the physicians called on behalf of the plaintiff. We have carefully considered the evidence, and are clearly of the opinion that the verdict is not at all excessive.

It is further urged that the court committed error in the admission and rejection of evidence; that the witness Colford should not have been permitted to testify that an automobile similar to the one that struck the child, going at a certain rate of speed, could be stopped within eighteen feet, for the reason that the weight, type of car, breaks and other elements were not included in the question. The witness testified that he had been in the automobile business; that he was familiar with and had operated all makes of machines, and that he saw the machine in question, and that if it was running twenty-five or thirty miles an hour, if the breaks were in good working order, and the road conditions favorable, it could be stopped in eighteen feet. We think the evidence competent as bearing on the defendant's negligence in operating the automobile. Crandall v. Krause, 165 Ill. App. 15; Chicago City Ry. Co. v. McLaughlin, 146 Ill. 353. Furthermore, the testimony of the witness did not

appears not only from the testimony of the physicians who testified on behalf of the plaintiff, but to some extent from the testimony of the physicians who testified on behalf of the defendant. And it further appears from the testimony of Dr. Grimm, who was appointed by the court at the challenge of defendants counsel to plaintiff's counsel made during the progress of the trial, before the jury, that plaintiff be examined by an impartial physician. It is conceded by counsel for defendants that the injuries to plaintiff, according to the opinion of this physician, were more severe than shown by the testimony of the physicians called on behalf of the plaintiff. We have carefully considered the evidence, and are clearly of the opinion that the verdict is not it all excessive.

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differ materially from that given by defendant's chauffeur.

It was also contended that the testimony given by the witness Harding was erroneous and improper, and although objection was sustained to it, this did not cure the error, for it was repeated several times. This witness was a masseuse who treated the child several times and made measurements of plaintiff's arm. This evidence was all stricken out by consent of counsel, and all the facts testified to were amply proven by other testimony which is not complained of. There is no merit in this point.

It is also said that it was error to permit this witness to testify that she had treated plaintiff one hundred and ten times, at a charge of two dollars per treatment, for the reason that this expense would have to be borne by plaintiff's parents. This objection is unsound, since plaintiff in this case was suing by her mother as next friend, under the authority of American Car Co. v. Hill, 226 Ill. 236. Moreover, upon objection by defendant this testimony was stricken out, and in no event could it harm the defendant, since we hold that the verdict is most certainly not excessive.

Complaint is also made of other rulings of the court on the admission of evidence, as to the nature and effect of plaintiff's injuries. We think it unnecessary topass on these, as it would in no way affect the result.

It is further said that the argument of counsel was impropper. We think this point is not seriously urged. We have carefully considered the matter and find

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Complaint is also made of other rulings of the court on the admission of evidence, as to the nature and effect of plaintiff's injuries. We think it unnecessary to pass on these, as it would in no way affect the result.

It is further said that the argument of counsel was improper. We think this point is not seriously urged. We have carefully considered the matter and find

the argument entirely proper.

It is further insisted that the court erred in giving an instruction on behalf of plaintiff. This instruction told the jury, in effect, that if they found from a preponderance of the evidence that plaintiff had made out her case as laid in the declaration, she was entitled to a verdict. It has been repeatedly held by the Supreme Court of this state that while it is not good practice to refer the jury to the declaration, yet the giving of such an instruction is not reversible error, and the instruction in question has been approved in U. S. Brewing Co. v. Stoltenberg, 211 Ill. 531. It is argued, however, that this instruction is erroneous, because one of the counts of the declaration charged gross negligence in driving the automobile at rate of speed in excess of twenty miles per hour, without sounding any horn or giving any warning; that "it is not per se negligence to run an automobile at a speed of twenty miles an hour, that is to say, a charge in a declaration not counting upon a statute or ordinance fixing the speed, does not state a cause of action which charges that a defendant ran an automobile in excess of twenty miles an hour;" that it is not negligence per se to fail to sound a horn or give a warning when driving an automobile in a residence part of a city at a greater rate of speed than that permitted by the statute. Of course all the attendant circumstances must be taken into consideration in passing upon any instruction. No instruction is proper unless based upon the evidence in the case. The statute prohibits the driving of an automobile in a street such as the one in question at a greater rate of speed than fifteen miles per hour. Of course it is not necessary to plead the

the argument entirely proper.

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statute. We think the count clearly stated a good cause of action, and the evidence was sufficient to warrant the jury in finding that the allegations were proved. The chauffeur admitted that he saw children playing at the place in question, and that he did not give any warning, and under the circumstances as shown by the evidence, we think it clear that this count of the declaration was proved. People v. Falkovitch, 280 Ill. 321.

Counsel for plaintiff, in his brief, made a motion that the judgment be affirmed with ten per cent statutory damages, for the reason that it is apparent that the appeal is prosecuted merely for delay, and it is insisted that it is our duty to enforce this statute in this case. It appears to us that there is not much merit in any of the points urged by the defendant. The case was not a close one, but the liability was clearly established, yet we are unable to say that the appeal was not prosecuted in good faith but merely for delay.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

statute. We think the court clearly stated a good cause of action, and the evidence was sufficient to warrant the jury in finding that the allegations were proved. The demurrer admitted that he saw children playing at the place in question, and that he did not give any warning, and under the circumstances as shown by the evidence, we think it clear that this count of the declaration was proved. People v. Jackowitch, 289 Ill. 321.

Counsel for plaintiff, in his brief, made a motion that the judgment be affirmed with ten per cent statutory damage, for the reason that it is apparent that the appeal is prosecuted merely for delay, and it is insisted that it is our duty to enforce this statute in this case. It appears to us that there is not much merit in any of the points urged by the defendant. The case was not a close one, but the liability was clearly established, yet we are unable to say that the appeal was not prosecuted in good faith but merely for delay.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

497 - 23842

G. W. GALE,

Appellee,

vs.

M. L. MUNDAY and R. W. SCOTT, doing business as Munday and Scott,

Appellants.

212 I.A. 661

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

W. G. Gale brought suit against M. L. Munday and R. W. Scott to recover damages, claiming that he had been deceived and defrauded in a transaction involving the exchange of real estate. The case was tried before the court and jury; there was a verdict in plaintiff's favor for $3,000, upon which judgment was entered, to reverse which defendants prosecute this appeal.

The record discloses that the defendants were the owners of an 870 acre farm in Butler County, Iowa; that on June 14, 1913, plaintiff and defendants entered into a written contract whereby the plaintiff agreed to convey to the defendants real estate, located in Texas, Oklahoma and Colorado, together with certain personalproperty, in consideration of which defendants were to convey to plaintiff the Iowa farm.

Plaintiff contends that one of the considerations by which he was induced to execute the contract was that the defendants represented to him that part of

497 - 22442

G. W. GALE,

Appellee,

vs.

M. L. MUNDAY and R. W. SCOTT, doing business as Munday and Scott,

Appellants.

91S1A. 631

AUSTIN TERM

FRONT DIST.

COOK COUNTY.

MR. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court.

G. W. Gale brought suit against M. L. Munday and R. W. Scott to recover damages, claiming that he had been deceived and defrauded in a transaction involving the exchange of real estate. The case was tried before the court and jury; there was a verdict in plaintiff's favor for $2,[illegible], upon which judgment was entered, to reverse which defendants prosecute this appeal.

The record disclosed [illegible] that the [illegible] were the owners of an 80-acre farm in Madison County, Iowa; that on June 14, 1913, plaintiff and defendants entered into a written contract whereby the plaintiff agreed to convey to the [illegible] real estate, located in Texas, Oklahoma and [illegible], together with certain personal property, in [illegible] exchange for which they were to convey to plaintiff the Iowa farm.

Plaintiff claims that one of the considerations by which he was induced to execute the contract was that the defendants represented to him that part of

the Iowa farm was rented for $5 an acre and part of it for one-half of the oats and corn; that as a matter of fact, the rent which the tenant of the farm was to pay was $1 an acre for the land in wild grass; $2 an acre for land in tame hay; $2.50 an acre for land in drilled corn and one-third of the oats and corn; that the representations were, therefore, false and known to be false, and were made with the purpose of defrauding plaintiff; that by reason thereof, plaintiff was led to believe that the farm was worth more than its actual value and that plaintiff did not receive the amount of rent that he was entitled to. On the other hand the defendants' position is that they did not make any representations as to the amount of the rent, but expressly refused to do so; and further their position is that plaintiff falsely represented the value and condition of the Colorado lands. There was evidence offered by the plaintiff that tended to sustain his version of the matter. Defendants also introduced evidence to support their theory. The jury found in favor of the plaintiff, and this finding was approved by the trial court. We have carefully examined all the evidence in the record, and think it would serve no useful purpose to discuss it in detail, but we feel satisfied that there was ample evidence to support the finding of the jury.

It is earnestly insisted by the defendants that the damages are not sustained by the evidence; that an analysisof the evidence will show that even if defendants made the representations as to the amount of rent as contended for by plaintiff, he would have

the Iowa farm was rented for $5 an acre and part of it for one-half of the oats and corn; that as a matter of fact, the rent which the tenant of the farm was to pay was $1 an acre for the land in wild grass; $3 an acre for land in tame hay; $2.50 an acre for land in growing corn and one-third of the oats and corn; that the representations were, therefore, false and known to be false, and were made with the purpose of defrauding plaintiff; that by reason thereof, plaintiff was led to believe that the farm was worth more than its actual value and that plaintiff did not receive the amount of rent that he was entitled to. On the other hand the defendants' position is that they did not make any representations as to the amount of the rent, but expressly refused to do so; and further their position is that plaintiff falsely represented the value and condition of the Colorado lands. There was evidence offered by the plaintiff that tended to sustain his version of the matter. Defendants also introduced evidence to support their theory. The jury found in favor of the plaintiff, and this finding was approved by the trial court. We have carefully examined all the evidence in the record, and think it would serve no useful purpose to discuss it in detail, but we feel satisfied that there was ample evidence to support the finding of the jury.

It is earnestly insisted by the defendants that the damages are not sustained by the evidence; that an analysis of the evidence will show that even if defendants made the representations as to the amount of rent as contended for by plaintiff, he would have

received but $1,879.79 less rent for the year 1913; that this was the only damage, taking the evidence most favorably to the plaintiff, which the jury was warranted in allowing, and that no damages were allowed by the jury, based on the first count of the declaration that the land was of less value by reason of the rent actualy paid by the tenant than it would have been if the rent had been represented by defendants.

There are two counts in the declaration. The first claimed damages by reason of the difference in value of the farm as it actually was and the value of it as it would have been if the premises had been rented on the terms represented by the defendants. The second count sought to recover as damages the difference between the amount of rent for which the premises were actually rented for the year 1913 and the amount for which defendants represented the farm was rented.

If the defendants stated that the farm was rented for more than the rent actually reserved, this would be some evidence tending to show that the farm was of less value than the plaintiff might reasonably believe it to be worth. There was evidence also tending to show that the ordinary rental of the farm, which was more than that reserved by the lease, was less than that represented by the defendants, and according to plaintiff's theory if the jury believed that by reason of the false pepresentations made by the defendants plaintiff was induced to enter into the contract, they might well find that he was damaged, and as the defendants concede that if plaintiff's

received but $1,879.75 less rent for the year 1913; that this was the only damage, taking the evidence most favorably to the plaintiff, which the jury was warranted in allowing, and that no damages were allowed by the jury, based on the first count of the declaration that the land was of less value by reason of the rent actually paid by the tenant than it would have been if the rent had been represented by defendants.

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If the defendants stated that the farm was rented for more than the rent actually received, this would be some evidence tending to show that the farm was of less value than the plaintiff did reasonably believe it to be worth. There was evidence also tending to show that the ordinary rental of the farm, which was more than that received by the lessee, was less than that represented by the defendants, and according to plaintiff's theory if the jury believed that by reason of the false representations made by the defendants plaintiff was induced to enter into the contract, they might well find that he was damaged, and as the defendants concede that if plaintiff's

version of the matter is true, he has lost rent to the amount of $1,879.79, we think it cannot be said that the evidence does not warrant the additional amount included in the verdict.

The defendants also contend that the court committed reversible error in refusing to give instruction 6, offered on their behalf. This instruction sought to inform the jury that the defendants were entitled to recoup any damages they had suffered by reason of the false representations made by plaintiff in reference to the Colorado lands. The record discloses that the contract for the exchange of the property was made in June, 1913; that one of the defendants visited the Colorado lands the following August. The declaration was filed November, 1913, to which the defendants filed the general issue. Nothing further was done until February 24, 1917, two days before the case was reached for trial, when the defendants upon leave of court, filed notice that they would seek to recoup damages aggregating $7,000, by reason of a lien on the Colorado lands, levied for irrigation purposes; that the plaintiff warranted the title to the premises, and made no mention of this lien. It further appears from the evidence that prior to the beginning of the suit the plaintiff had complained to the defendants in reference to the false representations which he claimed the defendants had made regarding the Iowa farm, and was claiming damages by reason of such false representations, but at no time had the defendants made any claim for damages on account of any false representations made by plaintiff as to the Colorado lands. On the trial

version of the matter is true, he has left out to the amount of $1,879.79, we think it cannot be said that the evidence does not warrant the additional amount included in the verdict.

The defendants also contend that the court committed reversible error in refusing to give instruction 8, offered on their behalf. This instruction sought to inform the jury that the defendants were entitled to recoup any damages they suffered by reason of the false representations made by plaintiff in reference to the Colorado land. The record discloses that the contract for the exchange of the property was made in June, 1912; that one of the defendants visited the Colorado land the following August. The declaration was filed November, 1917, to which the defendants filed the general issue. Nothing further was done until February 24, 1919, two days before the case was reached for trial, at which time, upon leave of court, they filed a plea of set-off and sought to recoup damages sustained, by reason of a fraud on the Colorado land, based on representations made by plaintiff as to the Colorado land. At the trial, [illegible] appears from the evidence [illegible] of the suit [illegible] in reference to the [illegible] claimed the defendants [illegible] and are claiming [illegible] misrepresentation, but at no time has [illegible] claim for damages on account of any false representations made by plaintiff as to the Colorado land. At the trial

of the case, however, no evidence was offered tending to sustain the matters set up in the notice for recoupment, but the evidence offered tended to show that plaintiff had represented the Colorado lands to be all set in alfalfa, when in fact only a small portion was in alfalfa; that the plaintiff represented that the land, was of a certain value, when as a matter of fact it was not worth such amount; that by reason of these false representations defendants were deceived and induced to enter into the contract. It will be seen that the defendants in no manner sought to prove the matters set up in their notice filed two days before the trial began, and plaintiff contends that since defendants filed the notice of recoupment on account of the $7,000 irrigation lien, the evidence offered on this phase was improper. To this contention defendants reply that no objection was made when the evidence was offered, and as it was admitted by the court without objection, the defendants were entitled to have it submitted to the jury. No objection was made by plaintiff when it was offered that it was not within the terms of the notice. It is true that matters of recoupment may be offered in evidence under the general issue, and that no notice is necessary. But in any event, the instruction was properly refused for the reason that it omitted the element that the representations, if made by the plaintiff, were known by him to be false, or were made with a disregard of their truth of falsity. The instruction is also bad in that it failed to inform the jury that before the defendants could recoup for such damages they should have exercised ordinary care to guard against the alleged fraud. In fact these elements were included in

of the case, however, no evidence was offered tending to sustain the matters set up in the notice for recoupment, but the evidence offered tended to show that plaintiff had represented the Colorado lands to be all set in alfalfa, when in fact only a small portion was in alfalfa; that the plaintiff represented that the land was of a certain value, when as a matter of fact it was not worth such amount; that by reason of these false representations defendants were deceived and induced to enter into the contract. It will be seen that the defendants in no manner sought to prove the matters set up in their notice filed two days before the trial began, and plaintiff contends that since defendants filed the notice of recoupment on account of the $7,000 irrigation lien, the evidence offered on this phase was improper. To this contention defendants reply that no objection was made when the evidence was offered, and as it was admitted by the court without objection, the defendants were entitled to have it submitted to the jury. No objection was made by plaintiff when it was offered that it was not within the terms of the notice. It is true that matters of recoupment may be offered in evidence under the general issue, and that no notice is necessary. But in any event, the instruction was properly refused for the reason that it omitted the element that the representations, if made by the plaintiff, were known by him to be false, or were made with a disregard of their truth or falsity. The instructor is also bad in that it failed to inform the jury that before the defendants could recoup for such damages they should have exercised ordinary care to guard against the alleged fraud. In fact these elements were included in

an instruction given on behalf of the defendants in regard to what plaintiff must prove before he could recover,, and as the recoupment is in the nature of a cross-action, the defendants to sustain their claim for damages, are subject to the same requirements in respect to evidence as if they had brought a distinct action - the same requirements that were on the plaintiff to maintain his cause. The instruction did not contain these requirements and was therefore properly refused.

Finding no reversible error in the record, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

an instruction given on behalf of the defendants in regard to what plaintiff must prove before he could recover, and as the recoupment is in the nature of a cross-action, the defendants to maintain their claim for damages, are subject to the same requirements in respect to evidence as if they had brought a distinct action - the same requirements that were on the plaintiff to maintain his cause. The instruction did not contain these requirements and was in favor properly refused.

Finding no reversible error in the record, the judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

Oct 17

521 - 23866

212 I.A. 661

CITIZENS GERMAN NATIONAL BANK
OF HAMMOND, INDIANA,
a corporation,
Appellee,

vs.

A. BAUER DISTILLING AND IMPORTING COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal appellant seeks to reverse a judgment against it upon eight promissory notes, for $11,841.51. The record discloses that appellant executed the eight notes in suit payable to L. Sonnenschein; that the payee endorsed the same, and that the notes were discounted by the plaintiff, a banking corporation of Hammond, Indiana, crediting the proceeds of the notes to the Hammond Brewing Company, of which the payee was an officer; that the proceeds of the notes were checked out by the Hammond Brewing Company in due course of business; that the notes were all discounted by the plaintiff before maturity in the regular course of business and without notice of any infirmity.

The suit was brought against the payee and appellant, the maker of the notes. Judgment was entered for the amount of plaintiff's claim against both defendants. The maker alone has appealed. The defense interposed by the appellant was that it was a commercial corporation chartered by the State of Illinois to buy, sell, import and deal in wines, cordials, waters and all kinds

521 - 23266

CITIZENS GERMAN NATIONAL BANK OF RAMSOND, INDIANA, a corporation, Appellee.	212 I.A. 601
vs.	MINICIPAL COURT OF CHICAGO.
A. HAUSER DISTILLING AND IMPORTING COMPANY, a corporation, Appellant.	

MR. PRESIDING JUSTICE O'CONNOR delivers the opinion of the court.

By this appeal appellant seeks to reverse a judgment against it upon eight promissory notes, for $11,821.81. The record discloses that appellant executed the eight notes in suit payable to L. Sonnenschein; that the payee endorsed them, and that the notes were discounted by the plaintiff, a banking corporation of Ramsond, Indiana, crediting the proceeds of the notes to the Ramsond Brewing Company, of which the payee was an officer; that the proceeds of the notes were carried out by the Ramsond Brewing Company in the course of business; that the notes were all discounted by the plaintiff before maturity in the regular course of business and without notice of any infirmity.

The suit was brought against the maker and appellant, the owner of the notes. Judgment was entered for the amount of plaintiff's claim against both defendants. The maker did not appear. The defense interposed by the appellant was that it was a commercial corporation chartered by the state of Illinois to buy, sell, import and deal in wines, cordials, waters and all kinds

of liquors; that the notes were accommodation paper; that appellant received no benefit therefrom; that the making of the notes by appellant was the loaning of its money and credit to the payee, which appellant was not authorized to do under its charter, and that "the notes themselves bore sufficient evidence that they were ultra vires and to require the purchaser of the notes to inquire of the maker, consideration and purpose, and its authority and powers as such corporation to loan its money and credit and bind itself by the notes sued on, "--that the notes were ultra vires the corporate powers of appellant.

Another division of this court had occasion to pass upon the validity of another note issued by appellant and discounted under similar circumstances, and it was there held that the note was valid in the hands of an innocent holder without notice. American Trust & Savings Bank v. A. Bauer Distilling & Importing Company, 205 Ill. App. 255. We are entirely satisfied with the reasons given and the conclusions reached in the opinion in that case by Mr. Presiding Justice Barnes. In Daniels on Negotiable Instruments (6th Ed.) Sec.386, it is said: "Where a corporation has a general power, express or implied, to be a party to bills and notes, such instruments will be presumed to have been executed in the legitimate course of business, and whether so executed or not will be valid in the hands of bona fide holders without notice." There being no contention that the plaintiff was not a bona fide holder without notice of any claim of infirmity in the notes, the defense interposed cannot be maintained.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

of liquors; that the notes were accommodation paper; that appellant received no benefit therefrom; that the making of the notes by appellant was the loaning of its money and credit to the payee, which appellant was not authorized to do under its charter, and that "the notes themselves bore sufficient evidence that they were ultra vires and to require the purchaser of the notes to inquire of the maker, consideration and purpose, and its authority and power as such corporation to loan its money and credit and bind itself by the notes sued on, "--that the notes were ultra vires the corporate powers of appellant.

Another division of this court had occasion to pass upon the validity of another note issued by appellant and discounted under similar circumstances, and it was there held that the note was valid in the hands of an innocent holder without notice. American Trust & Savings Bank v. A. Bauer Distilling & Importing Company, 205 Ill. App. 258. In an entirely satisfied with the reasons given and the conclusions reached in the opinion in that case by Mr. Presiding Justice Barnes. In Daniels on Negotiable Instruments (6th Ed.)Sec. 1 , it is said: "Where a corporation has a general power, express or implied, to be a party to bills and notes, such instruments will be presumed to have been executed in the legitimate course of business, and whether no executed, or not will be valid in the hands of bona fide holders without notice." There being no contention that the plaintiff was not a bona fide holder without notice of any claim of infirmity in the notes, the defense interposed cannot be maintained.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

395 - 23740

212 I.A. 661

ALFONSO DUBOSSI,

Appellant,

vs.

GIOVANNI AMILLO & ANTON J. CERMAK, Bailiff of the Municipal Court,

Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Certain personal property having been taken by the Bailiff of the Municipal Court upon an execution in favor of the defendant, and the plaintiff having brought suit to regain it, the trial court - without a jury - found that the right to the property was in the defendants. This appeal is taken therefrom.

One Edward Vitrone who opened and owned a restaurant at 515 South State Street, on January 30, 1914 gave a chattel mortgage upon the personal property therein to the plaintiff. It was given to secure a promissory note in the sum of $500.00, due January 30, 1916 and was recorded on February 3, 1914. On February 9, 1916, a chattel mortgage bill of sale of the above mentioned personal property - the latter having been sold pursuant to notice - was given to the plaintiff and was duly recorded on the same day. The premises in which the personal property was located were leased on October 31, 1913, by Samuel Stern to Vitrone and one Marie Callegari for a period of five years. That lease was subsequently assigned by the lessees, Vitrone and Callegari to the plaintiff, and the assignment consented to by

212 I.A. 331

ALFONSO MINOSSI,

Appellant,

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

vs.

GIOVANNI ANILLO & ANTON G. GEMBAK, Bailiff of the Municipal Court,

Appellees.

MR. JUSTICE FARMER delivered the opinion of the court.

Certain personal property having been taken by the Bailiff of the Municipal Court upon an execution in favor of the defendant, and the plaintiff having brought suit to regain it, the trial court - without a jury - found that the right to the property was in the defendants. This appeal is taken therefrom.

One Edward Vitrone who opened and owned a restaurant at 318 South State Street, on January 2, 1914 gave a chattel mortgage upon the personal property therein to the plaintiff. It was given to secure a promissory note in the sum of $[illegible], due January 30, 1916 and was recorded on February 5, 1914. On February 2, 1916, a chattel mortgage bill of sale of the above mentioned personal property - the latter having been with pursuant to notice - was given to the plaintiff and was duly recorded on the same day. The property in which the personal property was located were leased on October 31, 1913, by Samuel Lerm to Vitrone and one Maria Gallegari for a period of five years. That lease was subsequently assigned by the lessees, Vitrone and Gallegari to the plaintiff, and the assignment consented to by

Samuel Stern the original lessor. The plaintiff obtained the necessary restaurant license for the year 1917 in his own name; also a liquor license for the years 1916 and 1917. The plaintiff was a barber and had a shop on State street where he had been located for about ten years. Vitrone testified that he originally owned the Vesuvius Restaurant; that the plaintiff prior to January 1914 loaned him $500.00 in small amounts at different times and that he gave the mortgage on the personal property as security; that the plaintiff foreclosed the mortgage in February, 1916; that the plaintiff owned the place after that time; that he, Vitrone acts as his manager; that the bills were received in the name of Vesuvius Restaurant; that prior thereto they came in his own name; that he paid the bills in cash as manager and himself received $15.00 a week as salary.

The question of fact in the case, is whether the plaintiff loaned Vitrone the sum of $500.00. The testimony of plaintiff is somewhat conflicting, inasmuch as he at first stated that he paid the $500.00 in cash in one lump sum which he drew from the bank in January 1916, and then later stated that it was paid in sums ranging from $50.00 to $75.00 which in the end aggregated $500.00 and that they were paid in November and December 1913, and January 1914. The plaintiff, further, testified that Vitrone bought the groceries and meats for the restaurant; that sometimes he (plaintiff) bought articles for the restaurant; that the bills came in the name of the restaurant; that he paid Vitrone $15.00 a week and gave him board and room; that he (plaintiff) went to the restaurant every night and examined the cash register

Samuel Stern the original lessor. The plaintiff obtained the necessary restaurant license for the year 1917 in his own name; also a liquor license for the years 1916 and 1917. The plaintiff was a barber and had a shop on State street where he had been located for about ten years. Vitrone testified that he originally owned the Veravius Restaurant; that the plaintiff prior to January 1914 loaned him $800.00 in small amounts at different times and that he gave the mortgage on the personal property as security; that the plaintiff foreclosed the mortgage in February, 1916; that the plaintiff owned the place after that time; that he, Vitrone acts as his manager; that the bills were received in the name of Veravius Restaurant; that prior thereto they came in his own name; that he paid the bills in cash as manager and himself received $16.00 a week as salary.

The question of fact in the case, is whether the plaintiff loaned Vitrone the sum of $800.00. The testimony of plaintiff is somewhat conflicting, inasmuch as he at first stated that he paid the $800.00 in cash in one lump sum which he drew from the bank in January 1916, and then later stated that it was paid in sums ranging from $50.00 to $75.00 which in the end aggregated $800.00 and that they were paid in November and December 1915, and January 1914. The plaintiff, further, testified that Vitrone bought the groceries and meats for the restaurant; that sometimes he (plaintiff) bought articles for the restaurant; that the bills came in the name of the restaurant; that he paid Vitrone $15.00 a week and gave him board and room; that he (plaintiff) went to the restaurant every night and examined the cash register

and the bills and took the money out of the cash register; that he paid the rent every month; that the name of the restaurant is the Vesuvius Restaurant; that Vitrone is manager; that he (plaintiff) had a savings account at the National City Bank. Klensch a clerk of the National City Bank testified that the plaintiff did not draw out a single sum of $500.00 from his bank account at any time in December 1913, January and February 1914, but that his account showed the following; balance December 1, 1913, $802.09, deposits $1149.00, withdrawals $1098.56; balance January 1, 1914, $522.48, deposits $1195.52, withdrawals $1164.61; balance February 1, 1914, $533.38; deposits $1086.25, withdrawals $1161.68.

There is no evidence that any creditor was deceived to his detriment by the change in ownership of the property in question; and whether or not the judgment obtained against Vitrone was for a debt accruing prior or subsequent to the transfer the record does not show. As to the bona fides of the transfer of the title, the testimony of Vitrone is, of course, uncontradicted. The defendant put in no proof save that of the bank clerk. The argument of counsel for the appellee is that, because the plaintiff, evidently somewhat unfamiliar with the English language, said at one time that he drew and paid $500.00 in a single sum and then subsequently - after the introduction of the evidence of the bank clerk - that he paid it in divers sums of small amount, he is not to be believed, and, that it follows therefrom, that neither the plaintiff nor Vitrone is to be believed. It seems, however, to us, bearing in mind the undisputed evidence, that the lease was assigned to the plaintiff, that he obtained the restaurant and liquor licenses, and that Vitrone stated that he was merely

and the bills and took the money out of the cash register; that he paid the rent every month; that the name of the restaurant is the Veneziana Restaurant; that Vittone is manager; that he (plaintiff) had a savings account at the National City Bank. Kleanoh a clerk of the National City Bank testified that the plaintiff did not draw out a single sum of $500.00 from his bank account at any time in December 1913, January and February 1914, but that his account showed the following: balance December 1, 1913, $808.00, deposits $1149.00, withdrawals $1098.88; balance January 1, 1914, $859.48, deposits $1193.38, withdrawals $1164.61; balance February 1, 1914, $888.38; deposits $1036.25, withdrawals $1101.88.

There is no evidence that any creditor was deceived to his detriment by the change in ownership of the property in question; and whether or not the judgment obtained against Vittone was for a debt accruing prior or subsequent to the transfer the record does not show. As to the *bona fides* of the transfer of the title, the testimony of Vittone is, of course, uncontradicted. The document put in no proof save that of the bank clerk. The argument of counsel for the appellee is that, because the plaintiff, evidently somewhat unfamiliar with the English language, said at one time that he drew and paid $500.00 in a single sum and then subsequently - after the introduction of the evidence of the bank clerk - that he paid it in divers sums of small amount, he is not to be believed, and, that it follows therefrom, that neither the plaintiff nor Vittone is to be believed. It seems, however, to us, bearing in mind the undisputed evidence, that the lease was assigned to the plaintiff, that he obtained the restaurant and liquor license, and that Vittone stated that he was merely

manager on a salary with board and lodging for himself and wife, and that he received the total sum of $500.00; that the judgment is manifestly against the weight of the evidence.

The judgment is, therefore, reversed and the cause remanded with directions that the court enter judgment finding that the right to the property is in the plaintiff.

REVERSED AND REMANDED.

manager on a salary with board and lodging for himself and wife, and that he received the total sum of $800.00; that the judgment is manifestly against the weight of the evidence.

The judgment is, therefore, reversed and the cause remanded with directions that the court enter judgment finding that the right to the property is in the plaintiff.

REVERSED AND REMANDED.

518 - 23863

MATTIE BLOOM,

Appellee,

vs.

THE RUDOLPH WURLITZER COMPANY, a corporation, etc.

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

212 I.A. 661

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action of replevin brought by the plaintiff to recover a piano sold by the defendant on monthly payments and which was subsequently taken by foreclosure of a chattel mortgage held by the defendant. The questions involved have been submitted to two juries and in each instance a verdict was returned in favor of the appellee.

Morris Bloom, husband of the plaintiff, bought from the defendant, two pianos on monthly payments, giving a chattel mortgage on each of them to secure the installments thereafter to become due. One piano was bought on July 16th, 1912 and the other on January 23rd, 1914. The first was an automatic, which was sold for the sum of $750.00, and delivered at 3637 South State street. The second was a Mehlin, sold for $425.00 and delivered at 3841 South State street, the home of the plaintiff and her husband.

312 I.A. 607

518 - 23868

MATTIE BLOOM,

Appellee,

vs.

THE RUDOLPH WURLITZER COMPANY, a corporation, etc.

Appellant.

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action of replevin brought by the plaintiff to recover a piano sold by the defendant on monthly payments and which was subsequently taken by foreclosure of a chattel mortgage held by the defendant. The questions involved have been submitted to two juries and in each instance a verdict was returned in favor of the appellee.

Morris Bloom, husband of the plaintiff, bought from the defendant, two pianos on monthly payments, giving a chattel mortgage on each of them to secure the installments thereafter to become due. One piano was bought on July 16th, 1912 and the other on January 23rd, 1914. The first was an automatic, which was sold for the sum of $750.00, and delivered at 3857 South State street. The second was a Kohlin, sold for $425.00 and delivered at 3841 South State street, the home of the plaintiff and her husband.

The final payment and some back balance on the automatic, came due July 8th, 1915, and on that date a new chattel mortgage was given by Morris Bloom, securing his promissory note for the sum of $197.25. Payments on both pianos were made from time to time thereafter, until, according to the claim of the defendant, a balance was due on the automatic amounting to $17.50, and a balance due on the Mehlin (subject of this replevin) amounting in principal and interest to the sum of $136.50.

On or about July 8th, 1915, Morris Bloom became mentally unbalanced, and though never adjudicated insane, was sent to a sanitarium and had not recovered at the time this action was begun. On February 1st, 1916, N. K. Aranoff, appellee's brother, at her request, took charge of Morris Bloom's business matters; and several letters were offered in evidence showing that he asked appellant for an itemized statement of the amounts due from Bloom, husband of the plaintiff. Aranoff testified that he talked with Keating, one of the managers for the defendant, and was told to continue the payments and a statement would be sent later. Accordingly, payments were made until a further total sum of $90.00 had been paid. Aranoff further testified that some time in August, 1916, as he had not received any itemized statements, in a telephone conversation with J. K. Morgan, one of the office force in charge of collections in one of the automatic departments of the defendant, he threatened to start suit against the defendant for an accounting, charging that money had been paid on the two pianos, which had not been credited to Bloom's account; that Morgan said he would have a talk with the head of his department and let Aranoff know in fifteen minutes; that later on

The final payment and none been balance on the automobile, came due July 8th, 1918, and on that date a new chattel mortgage was given by Morris Bloom, securing his promissory note for the sum of $127.25. Payments on both pianos were made from time to time thereafter, until, according to the claim of the defendant, a balance was due on the automobile amounting to $17.50, and a balance due on the Mehlin (subject of this replevin) amounting in principal and interest to the sum of $130.50.

On or about July 8th, 1918, Morris Bloom became mentally unbalanced, and though never adjudicated insane, was sent to a sanitarium and had not recovered at the time this action was begun. On February 1st, 1918, M. K. Arnoff, appellee's brother, at her request, took charge of Morris Bloom's business matters; and several letters were offered in evidence showing that he asked appellant for an itemized statement of the amounts due from Bloom, husband of the plaintiff. Arnoff testified that he talked with Keating, one of the managers for the defendant, and was told to continue the payments and a statement would be sent later. Accordingly, payments were made until a further total sum of $60.00 had been paid. Arnoff further testified that some time in August, 1918, he had not received any itemized statements, in a telephone conversation with G. K. Gorman, one of the office force in charge of collections in one of the automobile departments of the defendant, he threatened to start suit against the defendant for an accounting, charging that money had been paid on the two pianos, which had not been credited to Bloom's account; that Gorman said he would have a talk with the head of the department and let Arnoff know in fifteen minutes; that later on

Morgan called up and said, "If I would send him $15.00 it will square the account for the Morris Bloom pianos, and my sister will have title and he will cancel all the papers and send me a receipt in full for the transaction;" that the $15.00 was sent and that on August 5, 1916, the defendant sent to Aranoff a letter containing the following:- "Confirming our telephone conversation with you yesterday, we enclose herewith statement showing a balance of $17.50 due on Morris Bloom's account." That letter was signed, "THE RUDOLPH WURLITZER CO., J. K. Morgan." When the $15.00 was paid, the defendant turned over to Aranoff's assistant, in addition to the statement for $17.50, a release of the sixty-five note Wurlitzer Piano, #17402, being the so-called"automatic". The testimony of Aranoff as to the alleged conversation with Morgan was denied by the latter.

Subsequently on December 14th, 1916, a collector and a man in the employ of the defendant, called at the home of the plaintiff, and demanded payment of $160.00, or the right to take away the Mehlin Piano. Plaintiff refused to pay the amount demanded and the piano was then taken by the man sent by the defendant, and remained in its possession until replevined by the plaintiff in the present action.

It is urged by the defendant that Morgan, who made the arrangement testified to by Aranoff, was not an authorized agent of the defendant, and had no power to make a settlement; that there was no accord and satisfaction, and that no evidence was introduced to show that the plaintiff was entitled to the possession of the property which was replevined. The evidence as to what transpired between

Morgan called up and said, "If I would send him $15.00 it will square the account for the Morris Bloom piano, and my sister will have title and he will cancel all the papers and send me a receipt in full for the transaction;" that the $15.00 was sent and that on August 5, 1916, the defendant sent to Azamoff a letter containing the following:- "Confirming our telephone conversation with you yesterday, we enclose herewith statement showing a balance of $17.50 due on Morris Bloom's account." That letter was signed, "THE RUDOLPH WURLITZER CO., J. K. Morgan." When the $15.00 was paid, the defendant turned over to Azamoff's assistant, in addition to the statement for $17.50, a release of the sixty-five note Wurlitzer Piano, #17402, being the so-called "autoerotic". The testimony of Azamoff as to the alleged conversation with Morgan was denied by the latter.

Subsequently on December 14th, 1916, a collector and a man in the employ of the defendant, called at the home of the plaintiff, and demanded payment of $100.00, or the right to take away the Wurlitz Piano. Plaintiff refused to pay the amount demanded and the piano was then taken by the man sent by the defendant, and remained in its possession until replevined by the plaintiff in the present action.

It is urged by the defendant that Morgan, who made the arrangement testified to by Azamoff, was not an authorized agent of the defendant, and had no power to make a settlement; that there was no accord and satisfaction, and that no evidence was introduced to show that the plaintiff was entitled to the possession of the property which was replevined. The evidence as to what transpired between

Aranoff and Morgan, is conflicting. Whether Aranoff or Morgan told the truth, was a matter for the jury. Likewise, the question whether Morgan had sufficient authority to state what was due, and agree upon a settlement. The letter of the defendant of August 5th, 1916, which undertakes to confirm the telephone conversation with Aranoff and recites that there was, "A balance of $17.50 due on Morris Bloom's account", is of course some evidence that no more than that amount was then due.

The evidence of the defendant is to the effect that the two pianos were considered as pertaining to two different departments of the defendant's store, and that the letter of August 5th, 1916, had reference only to the department which included automatic pianos and in no way referred to the Mehlin piano. We have been unable, even upon a careful search of the record, to find a complete and seemingly accurate statement of Bloom's account. It may well be that Morgan, who, we think, undoubtedly acted for the defendant, in his dealings with Aranoff, only intended to close up the account of the automatic piano. But, on the other hand, the testimony of Aranoff, corroborated as it is in part, at least, by the statement of August 5, 1916, is to the contrary, and the jury might well believe the latter, and that the whole account was agreed upon and settled.

Of course the position of the plaintiff was a difficult one, owing to the mentalcondition of her husband. When a man becomes mentaly afflicted and his wife has to take up his business matters, as in the

Aranoff and Morgan, is conflicting. Whether Aranoff or Morgan told the truth, was a matter for the jury. Likewise, the question whether Morgan had sufficient authority to state what was due, and agree upon a settlement. The letter of the defendant of August 5th, 1916, which undertakes to confirm the telephone conversation with Aranoff and recites that there was, "A balance of $17.50 due on Morris Bloom's account", is of course some evidence that no more than that amount was then due.

The evidence of the defendant is to the effect that the two pianos were considered as pertaining to two different departments of the defendant's store, and that the letter of August 5th, 1916, had reference only to the department which included automatic pianos and in no way referred to the Kohlin piano. We have been unable, even upon a careful search of the record, to find a complete and seemingly accurate statement of Bloom's account. It may well be that Morgan, who, we think, undoubtedly acted for the defendant, in his dealings with Aranoff, only intended to close up the account of the automatic piano. But, on the other hand, the testimony of Aranoff, corroborated as it is in part, at least, by the statement of August 5, 1916, is to the contrary, and the jury might well believe the latter, and that the whole account was agreed upon and settled.

Of course the burden of the plaintiff was a difficult one, owing to the mental condition of her husband. When a man becomes mentally afflicted and his wife has to take up his business matters, as in the

present case, it is not infrequently difficult for her to be certain as to the correctness of bills rendered against him. As the account in the instant case had been running for years, and the defendant was disinclined to show in any satisfactorily detailed way how much Bloom had paid, or just what the items were, the jury may have given entire credit to Aranoff's testimony and, under the circumstances, we do not feel justified in holding that the verdict was clearly against the weight of the evidence. Of course, the obligation to prove what payments had been made and what the state of the account was, rested on the defendant who took the piano from the possession of the plaintiff. In other words, the burden of proving indebtedness, if any, which would justify the taking of the piano, was on the one who claimed to be a creditor and not on the alleged debtor.

As to the plaintiff's right to possession, it is evident that the defendant recognized her as having possession of the piano. Aranoff testified that Morgan called him up and said that if he would send $15.00 it would, "Square the account for the Morris Bloom Pianos, and my sister will have title," etc., and on May 22nd, 1916, defendant wrote, "Mrs. Bloom is going to pay out on both pianos", etc. Under the circumstances, we are of the opinion that the defendant not only received money on behalf of the plaintiff in part payment of the piano, but recognized and treated her as being entitled to its possession.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

present case, it is not infrequently difficult for her to be certain as to the correctness of bills rendered against him. As the account in the instant case had been running for years, and the defendant was claiming to show in any satisfactorily detailed way how much Bloom had paid, or just what the items were, the jury may have given entire credit to Aranoff's testimony and, under the circumstances, we do not feel justified in holding that the verdict was clearly against the weight of the evidence. Of course, the obligation to prove what payments had been made and what the state of the account was, rested on the defendant who took the piano from the possession of the plaintiff. In other words, the burden of proving indebtedness, if any, which would justify the taking of the piano, was on the one who claimed to be a creditor and not on the alleged debtor.

As to the plaintiff's right to possession, it is evident that the defendant recognized her as having possession of the piano. Aranoff testified that Morgan called him up and said that if he would send $18.00 it would "figure the account for the Morris Bloom pianos, and my sister will have title," etc., and on May 22nd, 1916, defendant wrote, "Mrs. Bloom is going to pay out on both pianos", etc. Under the circumstances, we are of the opinion that the defendant not only received money on behalf of the plaintiff in part payment of the piano, but recognized and treated her as being entitled to its possession.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

23875 - 530

212 I.A. 662

B. PETCHAFT,
Appellee,

vs.

HALPERIN BROTHERS CO.,
(a corporation)
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in the sum of $346.50, entered by the trial court without a jury, in favor of the plaintiff, E. Petchaft, and against the defendant, Halperin Brothers Co., (a corporation).

The theory of the plaintiff, and which is supported by his evidence, is that on February 10, 1915, at the request of the defendant corporation, he loaned the latter the sum of $500.00, and received therefor, a promissory note, for that amount, payable in ninety days to the order of one Harry Slavinski and signed by the defendant corporation; that in making the loan he gave on February 11, 1915, to the defendant corporation, a check for $500.00 on the West Side Trust & Savings Bank, and payable to the order of the defendant corporation; that subsequently the check was returned, endorsed, "Halperin Brothers Co., - Harry Slavinski." That on May 10, 1915 when the $500.00 note became due, one of the Halperin Brothers paid $200.00 on that note and gave a new note in the sum of $300.00, signed "Halperin Brothers, A. Halperin." That at the time Halperin gave him the $300.00 note

23875 - 350

212144662

S. PETCHART, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
HALPERIN BROTHERS CO., (a corporation) Appellant.	

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment in the sum of $346.50, entered by the trial court without a jury, in favor of the plaintiff, S. Petchart, and against the defendant, Halperin Brothers Co., (a corporation).

The theory of the plaintiff, and which is supported by his evidence, is that on January 10, 1919, at the request of the defendant corporation, he loaned the latter the sum of $500.00, and received therefor, a promissory note, for that amount, payable in ninety days to the order of one Harry Slavinski and signed by the defendant corporation; that in making the loan, on January 11, 1919, to the defendant corporation, a check for $500.00 on the West Side Trust & Savings Bank, and payable to the order of the defendant corporation; that subsequently the check was returned, endorsed, "Halperin Brothers Co., - Harry Slavinski." That on May 10, 1919 when the $500.00 note became due, one of the Halperin Brothers paid $200.00 on that note and gave a new note in the sum of $300.00, signed "Halperin Brothers, A. Halperin." That at the time Halperin gave him the $300.00 note

nothing was said about the note of the co-partnership. That later, Halperin Brothers, a co-partnership, having gone into bankruptcy, the plaintiff had a conversation with Al Halperin, one of the brothers constituting the co-partnership, in the course of which Al Halperin said that the plaintiff had a corporation note, and that as soon as they, Halperin Brothers, were discharged from bankruptcy, it would be paid.

It is the theory of the defendant that Halperin Brothers gave the note for $500.00 to Slavinski as an accommodation, and expecting thereafter to take it out in the purchase of cigars from Slavinski; that Slavinski got the plaintiff to discount the $500.00 note for himself; that the note was payable to Slavinski, and subsequently $200.00 was paid by Halperin Brothers on the $500.00 note, and as a note dated May 10, 1915, for $300.00, which was signed "Halperin Brothers, A. Halperin", was given, there was then no liability on the part of the defendant corporation.

The original statement of claim, filed by the plaintiff on September 2, 1916, was based on a $300.00 note dated May 10, 1915, payable to the plaintiff in ninety days, and signed, "Halperin Bros., A Halperin". On November 2, 1916, a judgment by confession, in the sum of $346.50 and costs, was entered thereon. On November 10, 1916, pursuant to a motion and affidavit by the defendant, an order was entered, "that said judgment be opened, that leave be and hereby is given to the defendant to make defense herein, and that a trial of this cause be had notwithstanding said judgment, that said judgment stand as security, and that execution herein be stayed until

nothing was said about the note of the co-partnership. That later, Halperin Brothers, a co-partnership, having gone into bankruptcy, the plaintiff had a conversation with Al Halperin, one of the brothers constituting the co-partnership, in the course of which Al Halperin said that the plaintiff had a corporation note, and that as soon as they, Halperin Brothers, were discharged from bankruptcy, it would be paid.

It is the theory of the defendant that Halperin Brothers gave the note for $500.00 to Slavinski as an accommodation, and expecting thereafter to take it out in the purchase of cigars from Slavinski; that Slavinski got the plaintiff to discount the $500.00 note for himself; that the note was payable to Slavinski, and subsequently $500.00 was paid by Halperin Brothers on the $500.00 note, and as a note dated May 16, 1915, for $500.00, which was signed "Halperin Brothers, A. Halperin", was given, there was then no liability on the part of the defendant corporation.

The original statement of claim, filed by the plaintiff on September 2, 1916, was based on a $500.00 note dated May 16, 1915, payable to the plaintiff in ninety days, and signed, "Halperin Bros., A Halperin". On November 2, 1916, a judgment by confession, in the sum of $526.50 and costs, was entered thereon. On November 16, 1916, pursuant to a motion and affid vit by the defendant, an order was entered, "that said judgment be opened, that leave be and hereby is given to the defendant to make defense herein, and that a trial of this cause be had notwithstanding said judgment, that said judgment stand as security, and that execution herein be stayed until

the further order of this court."

On January 15, 1917, by leave of court, the plaintiff filed an amended statement of claim, reciting among other things, that at the time of maturity of the $500.00 note, the defendant paid $200.00 on account, and that the plaintiff consented, "to accept the defendant's renewal note for the unpaid balance, to-wit, $300.00, and that said original note thereupon was marked cancelled, and re-delivered to the defendant"; that the defendant delivered a new note in the sum of $300.00 to the plaintiff; that, "owing to the similarity of defendant's name, and the name signed in said last named note, plaintiff did not become aware until recently that defendant fraudulently, and pretendingly (sic.) of delivering to plaintiff a note never intended to be accepted by plaintiff," etc. That, "the delivery of such a note * * * constitutes a fraud, deceit and mistake upon this plaintiff." That therefore plaintiff sues upon the original indebtedness of $300.00 with interest.

On February 2, 1917, the defendant filed an affidavit of merits in the nature of a traverse, and a plea of the general issue.

On March 24, 1917, the trial judge entered the following order:- "The court finds that at the date of the rendition of the judgment by confession in this cause there was due from the defendant Halperin Brothers Co., (a corporation), to the plaintiff the sum of $346.50 * * * that the judgment rendered herein * * * stand confirmed in full force and effect as the judgment of this court as of the date of rendition thereof." etc.

the further order of this court.'

On January 15, 1917, by leave of court, the plaintiff filed an amended statement of claim, "stating among other things, that at the time of maturity of the $500.00 note, the defendant paid $200.00 on account, and that the plaintiff consented, "to accept the defendant's renewal note for the unpaid balance, to-wit, $300.00, and that said original note thereupon was marked cancelled, and re-delivered to the defendant"; that the defendant delivered a new note in the sum of $300.00 to the plaintiff; that, "owing to the similarity of defendant's name, and the name signed in said last named note, plaintiff did not become aware until recently that defendant fraudulently, and pretendingly (etc.) of delivering to plaintiff a note never intended to be accepted by defendant," etc. That, "the delivery of such a note * * * constitutes a fraud, deceit and mistake upon this plaintiff." That therefore plaintiff sues upon the original indebtedness of $500.00 with interest.

On February 2, 1917, the defendant filed an affidavit of merits in the nature of a traverse, and a plea of the general issue.

On March 24, 1917, the trial judge entered the following order:- "The court finds [illegible] the rendition of the judgment by default in this cause there was due from the defendant, [illegible] (a corporation), [illegible] the sum of [illegible] that the judgment rendered herein [illegible] shall be and continued in full force and effect as the judgment of this court as of the date of rendition thereof," etc.

The testimony is irreconcilable. The plaintiff and the witness Orr, for example, state positively that when on one occasion the plaintiff asked Halperin for some money on account, the latter told the plaintiff to wait until the bankruptcy proceedings were ended and that then the account would be paid in full, that as the plaintiff had a corporation note he need have no fear; and on the contrary, Halperin testified that no such conversation ever took place. There is also a controversy as to the form of the signature on the $500.00 note. The plaintiff says it was signed by the corporation. Landon, the discount teller of the West Side Trust & Savings Bank, testified that he had occasion to discount notes for the plaintiff sometime in February, 1915; that he recalled a note made out to Slavinski, and at the beginning of his examination he said he thought the note was signed by "Halperin Bros., by A. Halperin, as president", and was endorsed by Harry Slavinski and the plaintiff, but later upon further examination and after looking at the books of the bank, he was inclined to the opinion that it was not signed by the corporate name. The evidence shows, however, that the check dated February 11, 1915, for $500.00, and which represents the money originally loaned by the plaintiff, was payable to "Halperin Bros., Co." And that is a very significant circumstance, and when taken together with the other evidence on the part of the plaintiff, it becomes sufficient if believed, to justify the verdict of the jury. Where there is such an irreconcilable conflict in the evidence as exists in this case, and the determination of the truth depends so much upon the question of credibility, we are disinclined to over-ride the verdict of the jury. If the testimony of A. Z. Halper-

The testimony is irreconcilable. The plaintiff and the witness Orr, for example, state positively that when on one occasion the plaintiff asked Halperin for some money on account, the latter told the plaintiff to wait until the bankruptcy proceedings were ended and that then the account would be paid in full, that as the plaintiff had a corporation note he need have no fear; and on the contrary, Halperin testified that no such conversation ever took place. There is also a controversy as to the form of the signature on the $500.00 note. The plaintiff says it was signed by the corporation. Landon, the discount teller of the West Side Trust & Savings Bank, testified that he had occasion to discount notes for the plaintiff sometime in February, 1919; that he received a note made out to Slavinski, and at the beginning of his examination he said he thought the note was signed by "Halperin Bros., by A. Halperin, as president", and was endorsed by Harry Slavinski and the plaintiff, but later upon further examination and after looking at the books of the bank, he was inclined to the opinion that it was not signed by the corporate name. The evidence shows, however, that the check dated February 11, 1919, for $500.00, and which represents the money originally loaned by the plaintiff, was payable to "Halperin Bros., Co." And that is a very significant circumstance, and when taken together with the other evidence on the part of the plaintiff, it becomes sufficient if believed, to justify the verdict of the jury. Where there is such an irreconcilable conflict in the evidence as exists in this case, as the determination of the truth depends so much upon the question of credibility, we are disinclined to over-ride the verdict of the jury. If the testimony of A. A. Halper-

in, Rose Fox, and Slavinski is to be believed, the plaintiff would not be entitled to the judgment, and on the other hand, if the plaintiff and Orr are to be believed, then it ought to stand.

The defendant claims further that the final judgment was erroneous, as it purported to be merely a confirmation of the original judgment, which was entered when the statement of claim was only against Halperin Brothers. On November 10, 1916, the judgment by confession of November 2, 1916, was "opened", and yet according to the order allowed to "stand as security", and judgment stayed.

On March 24, 1917, the trial court entered a final judgment against the defendant, "Halperin Bros., Co.," in the sum of $346.50. The proceedings might have been more regularly conducted and recorded, but having in mind that there is no question of proper notice involved, and that the parties have practically the same title, we are unable to conclude that there was any sufficiently substantial error to justify a reversal.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

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The defendant claims further that the final judgment was erroneous, as it purported to be merely a confirmation of the original judgment, which was entered when the statement of claim was only against Halperin Brothers. On November 10, 1916, the judgment by confession of November 2, 1916, was "opened", and yet according to the order allowed to "stand as security", and judgment stayed.

On March 24, 1917, the trial court entered a final judgment against the defendant, "Halperin Bros., Co.," in the sum of $346.50. The proceedings might have been more regularly conducted and recorded, but having in mind that there is no question of proper notice involved, and that the parties have practically the same title, we are unable to conclude that there was any sufficiently substantial error to justify a reversal.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

539 - 23884

212 I.A. 662

MARY LASKI,
Appellee,

vs.

NATIONAL COUNCIL KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an action brought in the Municipal Court by the plaintiff on a fraternal benefit life insurance policy issued the plaintiff's husband by the defendant. There have been two jury trials in both of which judgment was rendered in favor of the plaintiff for the full amount of the policy and costs. It now comes before us a second time on an appeal by the defendant.

The contract of insurance in question provided that if the deceased should become intemperate in the use of alcoholic liquor, the certificate should become null and void. The beneficiary certificate shown in the record contains the provision that, "If the member holding this certificate should become intemperate in the use of alcoholic drinks, or if his death should result directly or indirectly from the use of alcoholic drinks, then the certificate should become null and void." The defense set up by the defendant in its affidavit of merits was that the insured while a member of the defendant's company became intemperate in the use of alcoholic liquors which directly or indirectly brought

329 - 23324

MARY LASKY,

Appellee,

vs.

NATIONAL COUNCIL FOR WOMEN AND LADIES OF COMMERCE,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE JACKSON delivered the opinion of the court.

This is an action brought in the municipal court by the plaintiff on a fraternal benefit life insurance policy issued the plaintiff's husband by the defendant. There have been two jury trials in both of which judgment was rendered in favor of the plaintiff for the full amount of the policy and costs. It now comes before us on a second time on an appeal by the defendant.

The contract of insurance in question provides that if the assured should become intemperate in the use of alcoholic liquor, the certificate would become null and void. The beneficiary certificate shows in the record containing the provision that, "if the member holding it is intoxicated or has been in habits in the use of alcoholic drink, or if his death should result directly or indirectly from the use of alcoholic drink, then the certificate shall become null and void." The defense set up [illegible] in its affidavit of merits was [illegible] of the defendant's [illegible] of alcoholic liquors which directly or indirectly brought

about his death.

The evidence shows that two days after the death of the insured a coroner's inquest was held and that the jury brought in a verdict that the deceased, "Came to his death on the 23rd day of January, 1914, from acute gastritis associated with status lymphaticus". The doctor who attended the deceased at the time of his death testified that in his opinion he died from alcoholism. However, there is so much evidence in the record to support and justify the verdict of the jury that we are of the opinion that it is unnecessary here to analyze or discuss the evidence on that subject. The chief contention of the defendant is that the trial judge erred in refusing to admit in evidence the following document:

> "I reside at 1416 W. Superior St. occupation housewife. The deceased is my husband. He was born in Poland, Russia; age 38 years; occupation wood finisher. Resided at 1416 W. Superior St., married, carried life insurance; left no estate to pay inquest fees.
>
> The deceased's health, hearing and eyesight was good up to the 23rd day of February, 1914, when he came home in the afternoon. He complained of being sick, it hurt him at his heart and then he went to the police station and consulted Doctor Nehls of the ambulance service, 32nd Police Station, who told him to take some baking soda in water and when he came home he went to his bed and then the deceased complained of his heart hurting him and he began toswoon. I then sent for Dr. Zermkowski, at 1757 W. North Ave., and when he arrived the deceased was delirious and unconscious and the deceased died February 23rd, 1914, at about 4:45 p.m. The deceased was a drinking man and would drink intoxicating liquors at times to excess and I now identify the body lying dead at 1416 W. Superior St. to be the body of the above named deceased, Joseph Orzel, my husband.
>
> Mary Orzel."

about his death.

The evidence shows that two days after the death of the insured a coroner's inquest was held and that the jury brought in a verdict that the deceased, "Came to his death on the 22nd day of January, 1914, from acute gastritis associated with status lymphaticus". The doctor who attended the deceased at the time of his death testified that in his opinion he died from alcoholism. However, there is no such evidence in the record to support and justify the verdict of the jury that we are of the opinion that it is unnecessary here to analyze or discuss the evidence on that subject. The chief contention of the defendant is that the trial judge erred in refusing to admit in evidence the following document:

"I people at Idlo . Superior ct. suspection homewife. The deceased is my husband. He was born in Poland, Russia; age 40 years; occupation wood finisher. Resided at Idlo W. Superior St., married, married life happiness; left no relative to pay lawyer fees.

The deceased, health, drinking and gambling was good up to the 22nd day of January, 1914, when he went out to the saloon at noon. Coming home at evening she, it went into the house and found then he went to the police station and consulted Doctor Hobbs of the ambulance service, North Station, who told him to take some drinking water and [illegible] on as some home remedy to him but the time the deceased complained of his stomach hurting him and he began vomiting. [illegible] Superior St. Workmen, [illegible] arrived the deceased was dead in an hour. Accident and the deceased died February 23rd, 1914, at about 4:45 p.m. The deceased was a drinking man and would drink intoxicating liquors at times to excess and I now identify the [illegible] dying dec. Idle W. Superior St. to be the body of the above named deceased, Joseph Oxzal, [illegible].

Mary Oxzal."

The evidence is that the plaintiff - who formerly bore the name of Mary Orzel - at the time of the inquest testified through an interpreter, one Viola Wojciechowski and admitted that she signed the above paper, but further stated, "I signed something but I didn't know what it was. There was no one interpreted it in the Polish language." On motion of the counsel for defendant the record shows that the latter part was stricken out although it does not show accurately what was meant. The interpreter, who purported to have interpreted the questions and answers put and given in Polish, was called, but it is evident from her testimony that although she may have been able to orally interpret the Polish language into English and vice versa, that she was not able to read English. No evidence was offered as to who actually prepared the document in question. The result is, as a matter of fact, that the evidence shows that the plaintiff signed the paper without knowing its contents and without being able to read its contents, and, of course, under those circumstances, it follows that it was inadmissible. As Mr. Justice Carter said in Belski's v. Deering Coal Co., 246 Ill. 62, "In the present case the witness repudiated the paper in the form in which it was presented to him and denied that he had knowledge of its contents. In the absence of testimony to show the contrary the paper was properly excluded by the trial court." People v. Ching Hing Chang, 74 Cal. 389.

The question, whether the contents of the paper were competent as a matter of impeachment or as containing answers against interest, does not arise,

The evidence is that the identifi - who formerly bore the name of Ary Fraal - at the time of the inquest testified through an interpreter, one Viola Wojtsekowski and admitted that she signed the above paper, but further stated, "I signed something but I didn't know what it was. There was no one interpreted it in the Polish language." In motion of the counsel for defendant the record shows that the latter part was stricken out although it does not show accurately what was meant. The interpreter, who purported to have interpreted the questions and answers put and given in Polish, was called, but it is evident from her testimony that although she may have been able to orally interpret the Polish language into English and vice versa, that she was not able to read English. No evidence was offered as to who actually prepare. the document in question. The result is, as a matter of fact, that the evidence shows that the plaintiff signed the paper without knowing its contents and without being able to read its contents, and, if so, under such circumstances, it follows that it was inadmissible.

As Mr. Justice Carter said in Pelkey v. Sporing, 1 N.D. 246 111. 62, "In the present case the witness testified the paper in the form in which it was presented to him and denied that he had knowledge of its contents. In the absence of testimony to show the contrary the paper was properly excluded by the trial court." Sample v. Chicago Times Journal, 7 N. D. 22.

The questions, [illegible] paper were competent [illegible] contradicting answers against interest, does not arise.

because it was not first shown that the document was under any circumstances and in any way binding on the plaintiff. Inasmuch as the actual writer of the paper was not called there was no evidence before the court but which was to the effect that the paper was not what it purported to be, and therefore it cannot be considered as binding on the plaintiff who not only never read it, but could not if she tried. If the proponent had undertaken to show that the contents of the paper written in English were in truth made up of the substance of the translation of interpretation of the plaintiff's answers by the interpreter, a different question would have been presented and the paper probably would have been competent.

It is further contended by the defendant that the court erred in refusing to allow the doctor to testify whether the disease described in the verdict of the coroner's jury could be brought about by the excessive use of alcoholic drink. Obviously that was incompetent, as no series of facts, purporting to be shown by the evidence and presented as an hypothesis or otherwise were presented to him for an expert opinion; what was called for was immaterial speculation.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

(OVER)

because it was not first shown that the document was under any circumstances and in any way binding on the plaintiff. Inasmuch as the actual writer of the paper was not called there was no evidence before the court but which was to the effect that the paper was not what it purported to be, and therefore it cannot be considered as binding on the plaintiff who not only never read it, but could not if she tried. If the proponent had undertaken to show that the contents of the paper written in English were in truth made up of the substance of the translation or interpretation of the plaintiff's answers by the interpreter, a different question would have been presented and the paper probably would have been competent.

It is further contended by the defendant that the court erred in refusing to allow the doctor to identify whether the disease described in the verdict of the coroner's jury could be produced about by the excessive use of alcoholic drink. Obviously that was incompetent, as no basis of fact, consisting to be shown by the evidence had been laid on hypothesis or otherwise were propounded to him for an expert opinion; and in a libel for was improperly admitted.

Finding no error in the record, the judgment is affirmed.

A. [illegible]

(CAV)

MR. JUSTICE THOMSON SPECIALLY CONCURRING:

While I concur in the decision announced in the foregoing opinion I do not agree with all of the reasons given therein. In my opinion the trial judge erred in sustaining the plaintiff's objection, when counsel for the defendant asked the physician witness "Is acute gastritis ever caused by alcoholism?"

The main ground of the plaintiff's objection and the one on which the court sustained it, was, that up to that time there was nothing in the record on which to base the question, which was true, but counsel for the defendant assured the court that he would later introduce "testimony along that line that will connect it up". Presumably this meant that he was going to introduce evidence later, showing or tending to show, that the cause of the death of the defendant was acute gastritis and counsel might better have made that specific offer. But upon the offer and assurance which counsel did make it is my opinion that the court should have overruled the objection and allowed the witness to answer the question.

However such error as there may have been in the ruling of the court became harmless when counsel for the defendant closed his case without introducing any such evidence, or offering to. That being the case he is now in no position to urge this ruling of the court as error.

MR. JUSTICE THOMSON DISSENTING:

While I concur in the decision announced in the foregoing opinion I do not agree with all of the reasons given therein. In my opinion the trial judge erred in sustaining the plaintiff's objection, when counsel for the defendant asked the physician witness "Is acute gastritis ever caused by alcoholism?"

The main ground of the plaintiff's objection and the one on which the court sustained it, was, that up to that time there was nothing in the record on which to base the question, which was true, but counsel for the defendant assured the court that he would later introduce "testimony along that line that will connect it up". Presumably this meant that he was going to introduce evidence tending, or having to show, that the cause of the death of the defendant was acute gastritis and counsel might better have made that specific offer. But upon the offer and assurance which counsel did make it is my opinion that the court should have overruled the objection and allowed the witness to answer the question.

However such error as there may have been in the ruling of the court below became harmless when counsel for the defendant closed his case without introducing any such evidence, or offering to. Just being the case he is now in no position to urge that [illegible] the court as error.

447 - 23792

MAY E. PHELAN, executrix of the Estate of Edward P. Phelan, deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,

Appellant.

212 I.A. 662

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action brought by the plaintiff, May E. Phelan against the defendant, Chicago Railways Company, for damages resulting from the death of Edward P. Phelan, the deceased, which was alleged to have been brought about by the negligence of the defendant in operating one of its street cars. The defendant has appealed from a judgment of $10,000.00, recovered by the plaintiff.

The deceased was a captain in the Chicago Fire Department. On the occasion in question, his company was responding to an alarm of fire. The deceased was riding on a ladder truck, seated beside the driver. The fire-house was located on Waller avenue about two hundred feet north of Lake street. Upon leaving the fire-house, the truck proceeded south in Waller avenue, keeping about in the middle of the thirty foot roadway. As the truck approached Lake street, a somewhat better view could be had of that street to the west than to the east, by reason of the fact that a building was located on the northeast

447 - 6298

MAY P. PHELAN, executrix of the
Estate of Edward P. Phelan, deceased,

Appellee,

vs.

CHICAGO RAILWAYS COMPANY,

Appellant.

ATTEND WRIT

TOWNSEND COURT,

COOK COUNTY.

MR. JUSTICE TOWNSEND delivered the opinion of the court.

This was an action brought by the plaintiff, May P. Phelan against the defendant, Chicago Railways Company, for damages resulting from the death of Edward P. Phelan, the deceased, which was alleged to have been brought about by the negligence of the defendant in operating one of its street cars. The defendant has appealed from a judgment of $12,000.00, recovered by the plaintiff.

The deceased was a captain in the Chicago Fire Department. On the occasion in question, a company was responding to an alarm of [illegible] deceased was riding on a ladder truck, behind the driver. The fire-house was located on Miller avenue about two hundred feet north of [illegible] street. Upon leaving the fire-house, the truck proceeded south in Miller avenue, keeping on the [illegible] side of [illegible] thirty feet reserved. [illegible] street, a number of [illegible] street to the west from [illegible] fact that a building was too [illegible] on the northwest

corner which came out to the sidewalk line, whereas the building on the northwest corner was located back from the building lines on both streets. Lake street was forty-eight feet wide from curb to curb and contained a double line of street car tracks. When the truck was approaching Lake street, a street car was observed coming from the west. The deceased raised his hand in that direction, and that car came to a stop a short distance west of Waller avenue. Another street car was approaching from the east along the north track. The evidence was conflicting, both as to the speed of the latter street car and as to the distance which intervened between the car and the east line of Waller avenue, at the time the truck came into view. As the truck proceeded into Lake street, it took a southeasterly course, across the westbound car track, and was straightening out in the eastbound car track, the front of the truck being in the eastbound track and about twenty-five feet east of the east line of Waller avenue, and the rear of the truck, still extending partially over the westbound track, when the westbound street car and the truck, collided, as a result of which, the truck was overturned, throwing the deceased to the ground and inflicting injuries which resulted in his death.

In urging that the judgment of the trial court be reversed, the defendant has called our attention to a number of instructions given to the jury which, it contends, were erroneous. The first of these instructions reads as follows:

corner which came out to the sidewalk line, whereas the building on the northwest corner was located back from the building lines on both streets. Lake street was forty-eight feet wide from curb to curb and contained a double line of street car tracks. When the truck was approaching Lake street, a street car was observed coming from the east. The deceased raised his hand in that direction, and that car came to a stop a short distance west of Waller avenue. Another street car was approaching from the east along the north track. The evidence was conflicting, both as to the speed of the latter street car and as to the distance which intervened between the car and the east line of Waller avenue, at the time the truck came into view. As the truck proceeded into Lake street, it took a southeasterly course, across the westbound car track, and was straightening out in the eastbound car track, the front of the truck being in the eastbound track and about twenty-five feet east of the east line of Waller avenue, and the rear of the truck, still extending partially over the westbound track, when the westbound street car ran into the truck, collided, as a result of which, the truck was overturned, injuring the deceased to the [illegible] and [illegible] injuries which resulted in his death.

In arguing that the judgment of the trial court be reversed, the defendant has cited [illegible] to a number of instructions given [illegible], which, it contends, were erroneous. The [illegible] instructions read as follows:

"9. The court instructs the jury that the duty of the driver of the fire vehicle in question in crossing Lake street, at the time and place in question, was to use such care as a reasonably prudent man would use under like circumstances, and if you find from a preponderance of the evidence under the instructions of the court that the driver of the fire vehicle in question, just before and while attempting to cross west Lake street at its intersection with Waller avenue was using such care as a reasonably prudent man would use under like circumstances, then deceased would not be guilty of contributory negligence."

This instruction is manifestly incorrect. Assuming that the driver of the fire vehicle at the time in question, "was using such care as a reasonably prudent man would use under like circumstances," it does not necessarily follow that the deceased would, therefore, "not be guilty of contributory negligence." Pienta v. Chicago City Railway Company, Illinois Supreme Court, 284 Ill. 246.

It is elementary that, if the deceased, Captain Phelan, was guilty of any negligence which proximately contributed to the injury which resulted in his death, the plaintiff cannot recover, and this without regard to the question of whether the driver was or was not negligent. Flynn v. Chicago City Railway Co., 250 Ill. 460, 464; Lynch v. Boston Elevated Railway, 224 Mass. 93. This instruction told the jury that the very contrary was true.

The plaintiff contends that the instruction is not one upon the subject of ordinary care, but of imputed negligence. We are unable to find any reference to the latter subject in the instruction. The instruction is not on the subject of imputed negligence,

"9. The court instructs the jury that the duty of the driver of the fire vehicle in question in crossing Lake street, at the time and place in question, was to use such care as a reasonably prudent man would use under like circumstances, and if, [illegible] from a preponderance of the evidence under the instructions of the court that the driver of the fire vehicle in question, just before and while attempting to cross West Lake street at its intersection with Walker avenue was using such care as a reasonably prudent man would use under like circumstances, then defendant would not be guilty of contributory negligence."

This instruction is manifestly incorrect. Assuming that the driver of the fire vehicle in [illegible] time in question, "was using such care as a reasonably prudent man would use under like circumstances," it does not necessarily follow that the defendant [illegible] therefore, "not be guilty of contributory negligence." Pierce v. Minneapolis Life & Accident Ass'n, [illegible] Supreme Court, 204 Ill. 3[illegible].

It is elementary that, if the defendant, [illegible] Phelan, was guilty of any negligence [illegible] proximately contributed to the injury [illegible] the plaintiff cannot recover, and this [illegible] to the question of whether the driver was [illegible] negligent. Lewis v. Chicago [illegible] 46[illegible] 404; Lewis v. [illegible] Company, [illegible] This instruction was [illegible] the very [illegible] same time.

The [illegible] contain[illegible] is not one [illegible] imputed negligence. [illegible] one to the latter [illegible] instruction is not on the [illegible]

but rather imputed ordinary care, and there is no such thing in the law.

In instructions 19 and 29, the trial court stated the law correctly on this question. The giving of these instructions, however, did not cure the error committed in giving instruction 9, of which the defendant complains. This is not a situation where an uncertainty or ambiguity contained in one instruction is explained in a later one. Instruction 9 on the one hand, and instructions 19 and 29 on the other, laid down conflicting and opposite propositions of law, one of which was correct, and the other, incorrect. In such a situation, it cannot be said which one the jury followed, and the error committed in giving the instruction stating the law incorrectly cannot be said to have been cured by giving the other instructions, stating the law correctly. C.B.& Q. R. R. v. Payne, 49 Ill. 500; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Ill. Match Co. v. C.R.I.& P. Ry. Co., 250 Ill. 396, 403-404.

The giving of the following instruction is also assigned as error:

> "6. The court instructs the jury that when it is said in these instructions that the deceased must have been in the exercise of ordinary care for his own safety, it is meant that deceased must have exercised that degree of care which an ordinarily prudent person, situated as the deceased was before and at the time of the accident in question, would exercise for his own safety."

We have carefully considered the phraseology of this instruction in the light of the decisions to which the defendant has called our attention. The instruction

but rather imputes ordinary care, and there is no such thing in the law.

In instructions 10 and 20, the trial court stated the law correctly on this question. The giving of these instructions, however, did not cure the error committed in giving instruction 9, at which the defendant complains. This is not a situation where an uncertainty or ambiguity contained in one instruction is explained in a later one. Instruction 9 on the one hand, and instructions 10 and 20 on the other, laid down conflicting and opposite propositions of law, one of which was correct, and the other, incorrect. In such a situation, it cannot be said which one the jury followed, and the error committed in giving the instruction stating the law incorrectly cannot be said to have been cured by giving the other instructions, stating the law correctly. C.R.I. & P. Co. v. Lee, 4 Ill. App. 522; Camp Point Mfg. Co. v. Ballou, 71 Ill. 417; Ill. Cent. R. Co. v. C.R.I. & P. Co., 221 Ill. 566, 568-9.

The giving of the following instruction is also assigned as error:

> "6. The court instructs the jury that when it is seen in these instructions that the deceased must have been in the exercise of ordinary care for his own safety, it is meant that deceased must have exercised that degree of care which an ordinarily prudent person, situated as the deceased was before and at the time of the accident in question, would exercise for his own safety."

We have carefully considered the philosophy of this instruction in the light of the evidence to show the defendant was a lineman or electrician. The instruction

involved here differs materially from the instructions which were passed upon in North Chicago Street Ry. Co. v. Cossar, 203 Ill. 608, 613; Roberts v. Chicago City Ry. Co., 262 Ill. 228, 234; C.M.& St. P. Ry. v. Halsey, 133 Ill. 248, 254; Selvage v. Chicago City Ry. Co., 205 Ill. App. 621, and Chambers v. Chicago City Ry. Co., 175 Ill. App. 362, and therefore they do not apply. In our opinion it cannot be said of this instruction as was said, by the court, in passing upon the instructions involved in the cases stated, that it limits the issue submitted to the jury as to contributory negligence, to the question of whether such negligence was present immediately at the time of the injury. As we read the instruction it clearly includes the issue whether or not the plaintiff was guilty of contributory negligence in permitting himself to get into a situation of danger. In our opinion the language of this instruction is more nearly like that used in instructions which were passed upon by our Supreme Court in Knox v. American Rolling Mill, 236 Ill. 437, 441; Krieger v. A. E. & C. R. R. Co., 242 Ill. 544, 551 and Peterson v. Chicago Traction Co., 231 Ill. 324, 327, and in the light of these decisions we are of the opinion that no error was committed in giving the instruction here complained of.

It is further contended by the defendant that the trial court erred in admitting in evidence a certain rule of the defendant company to the effect that "when any fire department vehicle * * * is running on the street, cars must be promptly stopped until such vehicle has passed * * *," and also in giving the jury an instruction (7) telling them that if they believed from

involved here differs materially from the instructions which were passed upon in North Chicago Rys. Co. v. Cosgrave, 203 Ill. 608, 613; Chicago v. Chicago City Ry. Co., 288 Ill. 179, 184; Lake St. R. Ry. v. Maloney, 185 Ill. 448, 454; Galvin v. Chicago City Ry. Co., 208 Ill. App. 521, and Wallace v. Chicago City Ry. Co., 175 Ill. App. 362, and therefore they do not apply. In our opinion it cannot be said of this instruction as was said, by the court, in passing upon the instructions involved in the case above, that it limits the jury submitted to the jury as to contributory negligence, to the question of whether such negligence was proximately at the time of the injury. As we read the instruction it clearly implies the jury whether or not the plaintiff was guilty of contributory negligence in permitting himself to get into a situation of danger. In the opinion the language of the instruction in question is more nearly like that used in instructions which were passed upon by the Supreme Court in Lynch v. American Rolling Mill, 270 Ill. 457, 461; Krieger v. A. B. & C. R. R. Co., 44 Ill. App. 144, and Peterson v. Chicago Junction Co., 225 Ill. App. 327, 332, in the light of these decisions we [illegible] no error was committed in giving [illegible] complained of.

It is further contended [illegible] the trial court erred in sustaining [illegible] ruling of the defendant to deny [illegible] any fire departure verdict [illegible] street, care must be promptly [illegible] been passed " " " and also in giving [illegible] instruction (V) telling them that if [illegible]

the evidence that the defendant had adopted this rule and that it was in effect on the day in question, "you may take into consideration in determining whether the deceased and driver of said truck were in the exercise of ordinary care for their own safety, their knowledge of said rule, if you believe from a preponderance of the evidence and under the instructions of the court that they knew of the existence thereof * * *." At the time this evidence was offered counsel for the plaintiff, in urging its admissibility, told the trial court that he was not offering it on the issue of the alleged negligence of the defendant but "for the purpose of showing ordinary care on the part of the driver of the wagon." The evidence in question was inadmissible for that purpose in the absence of proof of the fact that the driver knew of the existence of the rule, and further, that he relied upon an observance of it by the defendant or its servants. Carney v. Boston Elevated Ry. 219 Mass. 552. There not only is no such showing in the record, but such evidence as there is on the subject is to the contrary. The driver testified that he had never known of the rule and that the deceased had never spoken of it, but that he had frequently told him that, in proceeding to a fire in answering an alarm, they had the right of way. The evidence having been improperly admitted there was no occasion for the instruction on that subject. Furthermore, the instruction was erroneous in that it was argumentative. Devine v. Brunswick-Balke Co., 270 Ill. 504.

The defendant further contends that the trial court erred in giving the jury, plaintiff's instruction

the evidence that the defendant had adopted this rule and that it was in effect on the day in question, "you may take into consideration in determining whether the deceased and driver of said truck were in the exercise of ordinary care for their own safety, their knowledge of said rule, if you believe from a preponderance of the evidence and under the instructions of the court that they knew of the existence thereof." At the time this evidence was offered, counsel for the plaintiff, in urging its admissibility, told the trial court that he was not offering it on the issue of the alleged negligence of the defendant but "for the purpose of showing ordinary care on the part of the driver of the wagon." The evidence in question was inadmissible for that purpose in the absence of proof of the fact that the driver knew of the existence of the rule, and further, that he relied upon a observance of it by the defendant or its servants. Kenney v. South Shoreland Ry. 219 Iowa. 528. There not only is no such showing in the record, but such evidence as there is on the subject is to the contrary. The driver testified that he had never known of the rule and that the deceased had never spoken of it, but that he had frequently told him that, in proceeding to a place in answering an alarm, they had the right of way. The evidence being thus improperly admitted, there was a possibility for the attraction on that subject. Furthermore, the instruction was erroneous in that it [illegible]. Kenney v. Dubuque-Dubuque Co., 179 Ia. [illegible].

The defendant further contends that the trial court erred in giving the jury, [illegible] instruction

5 in which the jury were told they had "a right to take into consideration" certain enumerated matters "in determining upon which side is the preponderance of the evidence," the instruction concluding "and from a consideration of all these matters, together with all the other facts and circumstances in evidence in the case, you should determine upon which side lies the preponderance of evidence." It is urged that the court erred in giving this instruction because (1) the element of the number of witnesses testifying on one side and on the other was omitted in enumerating the matters to be taken into consideration, (2) the court told the jury that they should determine the preponderance of the evidence from the enumerated elements, and (3) the court indluded in these elements, the question of interest or lack of interest, if any, of the several witnesses, in the result of the suit, although the evidence was not such as to warrant doing so.

In our opinion this instruction is not open to the objection first urged against it by the defendant, as it might have been had it omitted the phrase, "together with all the other facts and circumstances in evidence in the case." Chicago Union Traction Co. v. Hampe, 228 Ill. 346, 350; Miers v. Fuller Co., 167 Ill. App. 49; Larsen v. Corby Co., 198 Ill. App. 109; E.J.E. Ry. Co. v. Lawlor, 229 Ill. 621, 632. Our position is the same with regard to the second point urged against the instruction.

While our Supreme Court has criticised a similar instruction on the ground last urged by the defendant against the instruction involved here (Roberts v. Chicago

5 in which the jury were told they had "a right to take into consideration" certain enumerated matters "in determining upon which side is the preponderance of the evidence," the instruction concluding "and from a consideration of all these matters, together with all the other facts and circumstances in evidence in the case, you should determine upon which side lies the preponderance of evidence." It is urged that the court erred in giving this instruction because (1) the element of the number of witnesses testifying on one side and on the other was omitted in enumerating the matters to be taken into consideration, (2) the court told the jury that they <u>should</u> determine the preponderance of the evidence from the enumerated elements, and (3) the court included in these elements, the question of interest or lack of interest, if any, of the several witnesses, in the result of the suit, although the evidence was not such as to warrant doing so.

In our opinion this instruction is not open to the objection first urged against it by the defendant, as it might have been had it omitted the phrase, "together with all the other facts and circumstances in evidence in the case." <u>Chicago Union Traction Co. v. Lange</u>, 220 Ill. 346, 350; <u>Mere v. Miller Co.</u>, 147 Ill. App. 49; <u>Barnes v. Gorby Co.</u>, 198 Ill. App. 165; <u>N.K.W. Co. v. Lawler</u>, 229 Ill. 621, 632. [illegible] with regard to the second point urged against the instruction.

While our Supreme Court has not [illegible] a similar instruction on the [illegible] last [illegible] [illegible] against the instruction involved [illegible] <u>Roberts v. Chicago</u>

City Ry. Co., 262 Ill. 228, 232, 233.) the error was not held to be reversible and we cannot so consider it.

The defendant further contends that the trial court erred in giving plaintiff's instructions 8 and 10. Each of these instructions directed the jury to return a verdict for the plaintiff if they believed a preponderance of the evidence established the facts referred to in the instructions as alleged in the declaration. Neither of the instructions included in its enumeration of the facts which would authorize a verdict, the element of due care on the part of the driver of the fire truck. Under the evidence, this element should have been included as it was essential to any recovery by the plaintiff, for the deceased had full authority over the driver in his management of the truck. Schultz v. Old Colony Street Railway Co., 193 Mass. 309; Lynch v. Boston Elevated Railway, 224 Mass. 93; Bofill v. New Orleans Railway and Light Co., 135 La. 996; Birmingham R. & E. L. Co. v. Baker, 126 Ala. 135; City of Louisville v. Botts, Admx., 151 Ky. 578; Colorado & S. R.R. Co. v. Thomas, 33 Colo. 517.

A similar instruction was held to be erroneous in Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243,- as the court there said: "The jury should be instructed with reference to the issues involved, in view of the questions raised and the facts proven on the trial."

The defendant urges that instruction 8 is also erroneous for the reason that it disregards the element of the care of the deceased in getting himself into a dangerous situation. The instruction on this point, directed a verdict for the plaintiff, if the jury believed

City Ry. Co., 208 Ill. 224, 232, 233.) the error was not held to be reversible and we cannot so consider it.

The defendant further contends that the trial court erred in giving plaintiff's instructions 3 and 10. Each of these instructions directs the jury to return a verdict for the plaintiff if they believed a preponderance of the evidence established the facts referred to in the instructions as alleged in the declaration. Neither of the instructions included in the enumeration of the facts which would authorize a verdict, the exercise of due care on the part of the driver of the fire truck. Under the evidence, this element should have been included as it was essential to the recovery by the plaintiff, for the defendant had an authority over the driver in his management of the truck. Chicago v. The Chicago Street Railway Co., 193 Ill. 362; Wright v. Boston Elevated Railway, 224 Mass. 63; Moffit v. New Orleans Railway and Light Co., 130 La. 978; Illinois Cent. R. R. Co. v. Baker, 120 Ala. 159; City of Louisville v. Kehr, Adm., 151 Ky. 528; Colorado & S. R. Co. v. Thomas, 33 Colo. 465.

A similar instruction was held to be erroneous in Terre Haute Number Two v. Lemley, 14 Ind. App. 1, the court there said: "The jury should be informed with reference to the issues involved, [illegible] the facts raised and the facts proved in the trial."

The defendant urges that [illegible] is also erroneous for the reason that it [illegible] the act of the care of the deceased in driving the fire truck into a dangerous situation. The instruction [illegible] directed a verdict for the plaintiff, if the jury believed

the deceased was in the exercise of ordinary care for his own safety "at and just prior to the happening of the accident in question." This point is covered by what we have said above in connection with instruction 6.

The defendant contends further that the trial court erred in giving the jury plaintiff's instruction 4, in which they were told that if they believed any witness had testified falsely to any material matter, they were at liberty "to disregard the entire testimony of such witness, unless the same has been corroborated by other creditable evidence, or facts and circumstances in evidence." In this instruction, the words "the same" must be taken as referring to "the entire testimony of such witness". The instruction required the entire testimony of such a witness to be corroborated before the jury could regard any of it, and it was, therefore, improper. Chittenden v. Evans, 41 Ill. 251, 254; Zoeller v. Schmitz, 172 Ill. App. 167.

The giving of plaintiff's instruction 11, relating to the measure of damages, is also assigned as error. It told the jury that if they foundthe defendant guilty, it would be their duty to assess the plaintiff's damages, and that "in estimating plaintiff's damages, if any, you have the right to take into consideration whatever compensation you may believe from the evidence, the widow and next of kin may have expected in a pecuniary way from the continued life of the defendant's testate." The part of the instruction quoted, should not have been given and should be eliminated upon another trial.

the deceased was in the exercise of ordinary care for his own safety "at and just prior to the happening of the accident in question." This point is covered by what we have said above in connection with instruction 3.

The defendant contends further that the trial court erred in giving the jury particular instruction 4, in which they were told that if they believed any witness had testified falsely in any material matter, they were at liberty to disregard the entire testimony of such witness, unless the same has been corroborated by other credible evidence, or from the circumstances in evidence." In this instruction, the words "the same" must be taken as referring to "the entire testimony of such witness". The instruction required the entire testimony of such a witness to be corroborated before the jury could regard any of it, as it was, therefore, improper. Whittenden v. Vann, 41 Ill. App. 483; Keller v. Schmitz, 171 Ill. App. 187.

The giving of plaintiff's instruction [illegible], relating to the measure of damages, is also contended to be error. It told the jury that if they found for the defendant in the suit, it was their duty to assess the plaintiff's damages, and then [illegible] instruction [illegible], if any, you have [illegible] for the benefit of the widow and next of kin [illegible] way from the [illegible] The part of the instruction [illegible] given [illegible] trial.

It is further urged that the trial court erred in giving plaintiff's instruction 3 which declared that the jury were the sole judges of the facts in the case, and that the determination of all facts in the case was the sole province of the jury. It has repeatedly been held permissible to tell the jury that they have the power and authority to determine questions of fact from the evidence, and under the law, as stated in the instructions. But instructions such as the one given in the case at bar have often been before our courts, and have, as often, been declared erroneous. Chicago General Railway Co. v. Noveck, 94 Ill. App. 178; Maxwell v. C.& E.I. Ry. Co., 140 Ill. App. 156, 158; Chicago North Shore Street Ry. Co. v. Hebson, 93 Ill. App. 98, 101; Chicago Union Traction Co. v. Strand, 114 Ill. App. 479, 483; West Chicago Railway Co. v. Shannon, 106 Ill. App. 120, 128; C.B.& Q. R.R. Co. v. Greenfield, 53 Ill. App. 424, 429; Chicago City Railway Co. v. Mauger, 105 Ill. App. 579, 582.

While some of the matters we have referred to might not be considered as reversible error if they stood alone, the record is such that the judgment cannot stand.

Inasmuch as this case must be tried again, we have refrained from commenting upon the evidence, except as it became necessary to do so in connection with what we have said on the errors assigned on the instructions.

For the reasons given, the judgment of the Superior Court will be reversed, and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

It is further urged that the trial court erred in giving plaintiff's instruction 3 which declared that the jury were the sole judges of the facts in the case, and that the determination of all facts in the case was the sole province of the jury. It has repeatedly been held permissible to tell the jury that they have the power and authority to determine questions of fact from the evidence, and under the law, as stated in the instructions. But instructions such as the one given in the case at bar have often been before our courts, and have, as often, been declared erroneous. Chicago General Railway Co. v. Hoyack, 94 Ill. App. 178; Maxwell v. C.& E.I. Ry. Co., 140 Ill. App. 156, 158; Chicago North Shore Street Ry. Co. v. Hobson, 93 Ill. App. 98, 101; Chicago Union Traction Co. v. Stream, 114 Ill. App. 479, 483; West Chicago Railway Co. v. Shannon, 115 Ill. App. 120, 128; C.B.& Q. R.R. Co. v. Crowefield, 53 Ill. App. 424, 429; Chicago City Railway Co. v. Mangeer, 114 Ill. App. 579, 582.

While some of the authors we have referred to might not be considered as reversible error if they stood alone, the record is such that the judgment cannot stand.

Inasmuch as this case must be tried again, we have refrained from commenting upon the evidence, except as it became necessary to do so in connection with what we have said on the errors assigned on the instructions.

For the reasons given, the judgment of the Superior Court will be reversed, and the cause remanded to the trial court for a new trial.

REVERSED AND REMANDED.

470 - 23815

H. D. KENNEDY for use of
W. A. Seaman,

Appellee,

vs.

SEARLE S. BARNETT AND
PAUL P. BARNETT,

Appellants.

212 I.A. 662

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of the first class in the Municipal Court of Chicago, wherein the plaintiff sought to recover a real estate commission alleged to be due from the defendants. A hearing was had before the court without a jury, and the court found the issues for the plaintiff, and entered judgment against the defendants for the sum of $1500.00, from which they have appealed.

The defendants were engaged in business in the City of Chicago and were the owners of a Canadian farm which they were anxious to exchange for city property. The title was held by the defendant, Paul P. Barnett, but both of them seem to have had an interest in it. They were introduced to the plaintiff by a mutual acquaintance, and they had a number of conversations with him on the subject-matter of this farm and the possibility of exchanging it for some Chicago property. The evidence shows that the plaintiff was in Chicago temporarily in an effort to bring about some trades or exchanges of some Canadian properties that he owned. He came to Chicago

470 - 25815

H. D. KENNEDY for use of W. A. Seaman, Appellee,	212 I.A. 552
vs.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
BENJAMIN B. BARNETT AND PAUL P. BARNETT, Appellants.	

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an action of trover begun in the Municipal Court of Chicago, wherein the plaintiff sought to recover a real estate commission alleged to be due from the defendants. A jury was had before the court without a jury, and the court found the issues for the plaintiff, and entered judgment against the defendants for the sum of $1500.00, from which they have appealed.

The defendants were engaged in business in the city of Chicago and were the owners of a leasehold term which they were anxious to exchange for city property. The title was held by the defendant, Paul P. Barnett, but both of them seem to have had an interest in it. They were introduced to the plaintiff by a mutual acquaintance, and they had a number of conversations with him on the subject-matter of sale from the point of view of exchanging it for some Chicago property. The evidence shows that the plaintiff was in fact a trespasser in an effort to bring about some trades or exchanges of some Canadian properties that he owned. [illegible]

from Canada some time in January, 1914, and got acquainted with the defendants, the following month. These preliminary conversations between the parties were such as to amount to an authority, on the part of the defendants, to the plaintiff, to look about and accomplish some such exchange as they had in mind, if he could.

The evidence further shows that the plaintiff was acquainted with two other men from Canada, J. W. Rogers and F. J. Williams, who were engaged in business under the name of Rogers and Williams, as real estate brokers, with an office in Winnipeg, Canada. They, also, had come to Chicago in January, 1914 and engaged in the real-estate business with an office in the National Life Building. The plaintiff told them of the defendants' farm and learned that they had a client, one Collins M. Williams, owning two pieces of Chicago real estate which he might be willing to exchange for a farm in Canada. It was arranged that these parties be brought together in an effort to consummate a trade of the properties. While there is some conflict in the evidence on this point, we are of the opinion that it shows that the plaintiff took the defendants to the office of Rogers and Williams in the National Life Building and introduced them to F. J. Williams of that firm, and he, in turn introduced them to Collins M. Williams. On the day of this meeting, the plaintiff explained to Rogers and Williams and the defendants together that, both because he was in Chicago on an excursion ticket which was about to expire, and because he had business interests at home in Canada which demanded his attention, it was necessary for him to return there at once. He told them that he hoped that they would be able to consummate a deal and that whatever arrangement

from Canada some time in January, 1916, and [illegible] accompanied with the defendants, the following month. These preliminary conversations between the parties were such as to amount to an [illegible], on the part of the [illegible], to the plaintiff, to look [illegible] the [illegible] were [illegible] change as they had in view, [illegible].

The plaintiff further [illegible] was accompanied with two other men from Canada, [illegible] Rogers and [illegible] J. Mills, who [illegible] in business under the name of Rogers and Mills, [illegible] brokers, with an office in Winnipeg. [illegible], also, had come to Toronto in January, 1916, [illegible] real estate business with an office in the National Life Building. The plaintiff told some of the defendants' [illegible] and learned that they had a [illegible], one Collins [illegible] Williams, owning two pieces of Toronto real estate which he might be willing to exchange for a farm in Canada. It was arranged that these parties be brought together. It is an effort to consummate a trade of the properties. While there is some conflict in the evidence [illegible] we are of the opinion that it [illegible] that the plaintiff took the defendants to the office of [illegible] Williams in the National Life Building and [illegible] W. J. Williams [illegible] time to Collins [illegible] the plaintiff [illegible] defendants [illegible] on an excursion ticket which [illegible] because he had business [illegible] demanded his attention, it was necessary [illegible] there at once. He told them that he hoped [illegible] be able to consummate a deal and that whatever arrangement

or agreement they consummated as to the commission would be satisfactory to him. The plaintiff had had some conversation with one of the defendants previously as to a commission, the plaintiff stating that in Canada the usual commission was five per cent whether the deals were in the way of trades or for cash, and the defendants explaining that here commissions were limited to two and a half per cent. These preliminary conversations did not reach the point of an agreement as to what the commission was to be, but it seems clear from the evidence that the defendants assured the plaintiff that, if he succeeded in negotiating a satisfactory deal, they would pay him a commission.

After the return of the plaintiff to Canada, the deal which was pending when the plaintiff left Chicago, was consummated. The contracts for this transaction were executed in the office of Rogers and Williams, and at that time, one of the defendants had a conversation with F. J. Williams in which he told him that he could not pay "you boys" more than $1500.00 in the way of a commission, which would have to take care of Kennedy, Rogers and Williams. After conferring with Rogers, Williams agreed to this, saying that they had authority to act for Kennedy, and that he was sure Kennedy would abide by it. There is conflicting testimony on the question of whether, at this time, the defendants made this promise conditional upon F. J. Williams and his associates, taking care of one Stewart, who had previously been given an exclusive agency of the farm and on the further condition that they were not receiving any commission on the deal from Collins M. Williams. In

or agreement they consummated as to the commission would be satisfactory to him. The plaintiff had had some conversation with one of the defendants previously as to a commission, the plaintiff stating that in Canada the usual commission was five per cent whether the deals were in the way of trades or for cash, and the defendants explaining that their commissions were limited to two and a half per cent. These preliminary conversations did not reach the point of an agreement as to what the commission was to be, but it seems clear from the evidence that the defendants assured the plaintiff that, if he succeeded in negotiating a satisfactory deal, they would pay him a commission.

After the return of the plaintiff to Canada, the deal which was pending when the plaintiff left Chicago, was consummated. The contracts for this transaction were executed in the office of Rogers and Williams, and at that time, one of the defendants had a conversation with W. C. Williams in which he told him that he could not pay "you boys" more than five cents in the way of a commission, which would have to take care of Kennedy, Rogers and Williams. After quarreling with Rogers, Williams agreed to this, saying that he had authority to act for Kennedy, and that he was sure Kennedy would abide by it. There is conflicting testimony on the question of whether, at that time, the defendants made this promise conditional upon W. C. Williams and his associates, taking care of one Stewart, who had previously been given an exclusive agency of the firm and on the further condition that they were to receive any commission on the deal from Kelly & Williams. In

our opinion, the trial court was warranted under all the testimony, in reaching the conclusion that the promise of the defendants to pay the commission in question was not made subject to these conditions. After the transaction was closed, F. J. Williams made several calls upon the defendants for "our commission." Some months later, the plaintiff returned from Canada and also called upon the defendants for the commission. It seems that Stewart was claiming a commission on the strength of his exclusive agency, and the defendants told F. J. Williams and the plaintiff that they would not pay anybody, and when suit was threatened, they replied such a course would be satisfactory to them, because that would determine to whom they owed the commission.

The testimony shows that the plaintiff sued Searle Barnett for $3150.00, claiming that the defendant had promised to pay him the regular rate of commission of five per cent on the value of the farm, which was the basis of the trade, namely, $63,000.00. This suit was later dismissed but why, the record fails to show. Later, this suit was started in the name of Kennedy, Rogers and Williams, and a statement of claim was filed for $3150.00 on the same theory as that on which the first suit was based. When this case was reached for trial, the court allowed a motion by the plaintiff which eliminated Rogers and Williams as parties plaintiff, and permitted him to file an amended statement of claim in which he stated that his claim was for $1500.00, being the fair, reasonable value of his services which the defendants agreed to pay.

our opinion, the trial court was warranted under all the testimony, in accepting the conclusion that the promise of the defendants to pay the commission in question was not made subject to these conditions. After the transaction was closed, J. L. Williams made several calls upon the defendants for "our commission." Some months later, the plaintiff returned from Canada and also called upon the defendants for the commission. It seems that Stewart was claiming a commission on the strength of his exclusive agency, and the defendants told M. L. Williams and the plaintiff that they would not pay anybody, and when suit was threatened, they replied such a course would be satisfactory to them, because that would determine to whom they owed the commission.

The testimony shows that the plaintiff sued Searle Burnett for $1250.00, claiming that the defendant had promised to pay him the regular rate of commission of five per cent on the value of the farm, which was the basis of the trade, namely, $62,500.00. This suit was later dismissed but why, the record fails to show. Later, this suit was claimed in the name of Kennedy, Rogers and Williams, and a statement of claim was filed for $1250.00 on the same theory as that on which the first suit was based. When this case was reached for trial, the court allowed a motion by the plaintiff which eliminated Rogers and Williams as parties plaintiff, and permitted him to file a [illegible] statement of claim in which he stated that his claim for $1250.00, being the fair, reasonable value of his services which the defendants agreed to pay.

The defendants admit that one not a licensed real estate broker can recover his compensation for services rendered in affecting a sale or exchange of real estate, provided he is not engaged in business as a real estate broker generally, and provided, further, that he can show a special contract between the owner of the property and himself, covering such compensation. But the defendants claim that the plaintiff was engaged in business as a real estate broker, and that, therefore, he cannot recover, as he is shown by the evidence not to have been licensed as a broker as required by the ordinances of the City of Chicago. The evidence on this point is not entirely clear, but after a careful examination of it, we are of the opinion that it is to the effect that the plaintiff was not engaged in business as a real estate broker at the time of the transaction forming the basis of this suit.

It further seems to be established by the evidence that the plaintiff was the procuring cause of the exchange of properties which the defendants accomplished. The defendants authorized him to find some one willing to exchange city property for their farm if he could. He found Collins M. Williams and got the defendants in touch with him through his friends Rogers and Williams. The plaintiff is entitled to his commission, although the defendants were not actually introduced to the purchaser by the plaintiff but through others with whom the plaintiff had communicated. Rigdon v. More, 226 Ill. 382.

As far as the amount of the commission is concerned, it seems clear from the evidence that, after the plaintiff departed for Canada, Rogers and Williams were act-

The defendants admit that one not a licensed real estate broker can recover his compensation for services rendered in effecting a sale or exchange of real estate, provided he is not engaged in business as a real estate broker generally, and provided, further, that he can show a special contract between the owner of the property and himself, covering such compensation. But the defendants claim that the plaintiff was engaged in business as a real estate broker, and that, therefore, he cannot recover, as he is shown by the evidence not to have been licensed as a broker as required by the ordinances of the City of Chicago. The evidence on this point is not entirely clear, but after a careful examination of it, we are of the opinion that it is to the effect that the plaintiff was not engaged in business as a real estate broker at the time of the transaction forming the basis of this suit.

It further seems to be established by the evidence that the plaintiff was the procuring cause of the exchange of properties which the defendants accomplished. The defendants authorized him to find some one willing to exchange city property, for farm land in Iowa. He found Collins M. Williams and got the defendants in touch with him through his friends Rogers and Williams. The plaintiff is entitled to his commission, notwithstanding the defendants were not actually introduced to the purchaser by the plaintiff but through others with whom the plaintiff had communicated. Kirkton v. Moore, 220 Ill. , 82.

As far as the amount of the commission is concerned, it seems clear from the evidence that, after the plaintiff departed for Canada, Rogers and Williams were act-

ing for him, and the promise of the defendants to pay a commission of $1500.00, while made to Williams and expressed by the defendants as being a commission for "you boys", must be regarded as a promise made to the plaintiff through those in whose hands he had left that matter. If the plaintiff has any arrangement with Rogers and Williams whereby he is to share some proportion of his commission with them, that is a matter with which the defendants are not concerned. Poole v. Jeffery, 149 Ill. App. 381, 383. In our opinion, the promise of the defendants was not a promise to the plaintiff and others jointly.

The defendants urge that the plaintiff having filed a statement of claim in a previous suit in which he made oath that the defendants owed him a commission of five per cent or $3150.00, he can not now claim a commission based upon an express promise of $1500.00. We are of the opinion that this point is untenable. It may well be that in bringing his first suit, the plaintiff conceived that he had some rights based upon his preliminary conversation with one of the defendants, wherein he claims that he was promised "a commission" and if this be the case, that fact would certainly not estop him from ultimately concluding that the liability of the defendants, if any, must be based upon the express agreement involving the commission, that the evidence shows was made after his departure for Canada with those representing the plaintiff. Neither does it matter that in his last amended statement of claim, the plaintiff says that his claim is for $1500 as the fair, reasonable value of his services which the defendants agreed to pay, while the proof establishes

ing for him, and the promise of the defendants to pay a commission of $1500.00, which made to Williams and expressed by the defendants as being a commission for "your boys", must be regarded as a promise made to the plaintiff through these in some manner he had left that matter. If the plaintiff has any arrangement with Rogers and Williams whereby he is to share some proportion of his commission with them, that is a matter with which the defendants are not concerned. Kogle v. Jeffery, 149 Ill. App. 381, 385. In our opinion, the promise of the defendants was not a promise to the plaintiff and others jointly.

The defendants urge that the plaintiff having filed a statement of claim in a previous suit in which he made oath that the defendants owed him a commission of five per cent or $1500.00, he can not now claim a commission based upon an expense account of $1500.00. We are of the opinion that this point is untenable. It may well be that in bringing his first suit, the plaintiff conceived that he had some rights based upon his preliminary conversations with one of the defendants, wherein he claims that he was promised "commission" and if this be the case, that fact would certainly not entitle him from distinctly repudiating that the liability of the defendants, if any, must be based upon the express agreement involving the commission, that the evidence upon which he sues later has a feature for issues with those tendering the plaintiff. Neither does it appear that in his last amended statement of claim, the plaintiff made that claim is for $1500 as the fair, reasonable value of his services which the defendants agreed to pay, while the proof establishes

a promise by the defendants to pay that specific sum.

Finding no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

a promise by the defendants to pay that specific sum.

Finding no error in the record, the judgment of the municipal Court is affirmed.

AFFIRMED.

515 - 23860

212 I.A. 663

HENRY P. REGER,
Appellee,

vs.

JOHN J. O'SHEA,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

The complainant, Reger, and the defendant, O'Shea, with others, were stockholders in the American Heating and Plumbing Corporation which we shall hereafter refer to as the company. The Kewanee Boiler Company and the Kellogg-Mackay Company were creditors of the company in substantial amounts. There was some question about the company's solvency. The defendant undertook to put more money into the company, and one C. V. Kellogg of the Kellogg-Mackay Company and one B. F. Baker, of the Kewanee Boiler Company undertook to assist him in getting the company onto a sound financial basis. With this end in view, a contract was entered into between the defendant as party of the first part, the complainant Reger, Frank O'Shea and John H. Doose, all stockholders in the company, as parties of the second part, and Kellogg and Baker as parties of the third part. The first paragraph in the body of the contract provided "that all of the parties of the second part each hereby agrees to sell and each will transfer all of his capital stock of record on the books of the

815 - 25800

HENRY P. MOORE,

Appellee,

vs.

JOHN J. O'BRIEN,

Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

212 I.A. 603

MR. JUSTICE THOMPSON delivered the opinion of the court.

The complainant, Moore, and the defendant, O'Brien, with others, were stockholders in the American Heating and Plumbing Corporation which we shall hereafter refer to as the company. The Kewanee Boiler Company and the Kellogg-Maxsky Company were creditors of the company in substantial amounts. There was some question about the company's solvency. The defendant undertook to put more money into the company, and one G. V. Kellogg of the Kellogg-Maxsky Company and one S. Y. Baker, of the Kewanee Boiler Company undertook to assist him in getting the company onto a sound financial basis. With this end in view, a contract was entered into between the defendant as party of the first part, the complainant Moore, Frank O'Brien and John R. Moore, all stockholders in the company, as parties of the second part, and Kellogg and Baker as parties of the third part. The first paragraph in the body of the contract provided "that all of the parties of the second part each hereby agrees to sell and each will transfer all of his capital stock of record on the books of the

said corporation to the party of the first part," in consideration for which, the party of the first part, the defendant here, undertook to pay the respective parties of the second part, on or before October 1, 1915, a sum equal to $50.00 per share of said capital stock "less whatever amount now appears on the books of the corporation tobe due to it from said persons according to the statement of said account to be furnished by said corporation as of this date," which respective amounts, the party of the first part assumed and agreed to pay to the company. By the terms of the contract, the defendant further agreed to transfer to Kellogg and Baker, the parties of the third part, as trustees, two-thirds of the outstanding stock of the company, which would amount to four hundred shares, to be held by them as trustees "as security for payment of the indebtedness of said corporation, and for the payment of the purchase price of said capital stock to the parties of the second part." These are the portions of the contract which bear directly upon the issues here involved.

The complainant Reger was the owner of one hundred shares in the company and he performed his obligation under the contract, by endorsing and delivering his certificates of stock to the defendant. Of the other parties of the second part, Frank O'Shea held one hundred shares, fifty in his own right, and fifty being the property of the defendant, and Doose was the owner of one hundred shares. Frank O'Shea endorsed and delivered his certificates of stock to the defendant, but Doose never complied with the provisions of the contract,

said corporation to the party of the first part," in consideration of which, the party of the first part, the defendant here, undertook to pay the respective parties of the second part, on or before October 1, 1913, a sum equal to $50.00 per share of said capital stock "less whatever amount may appear on the books of the corporation to be due to it from said persons according to the statement of said account to be furnished by said corporation as of this date," which respective amounts, the party of the first part assumed and agreed to pay to the company. By the terms of the contract, the defendant further agreed to transfer to Kellogg and Baker, the parties of the third part, as trustees, two-thirds of the outstanding stock of the company, which would amount to four hundred shares, to be held by them as trustees "as security for payment of the indebtedness of said corporation, and for the payment of the purchase price of said capital stock to the parties of the second part." These are the portions of the contract which bear directly upon the issues here involved.

The complainant Roger was the owner of one hundred shares in the company and he performed his obligation under the contract, by endorsing and delivering his certificates of stock to the defendant. Of the other parties of the second part, Frank O'Shea held one hundred shares, fifty in his own right, and fifty being the property of the defendant, and Doose was the owner of one hundred shares. Frank O'Shea endorsed and delivered his certificates of stock to the defendant, but Doose never complied with the provisions of the contract,

and still remains the owner and holder of his one hundred shares. The complainant has never received anything from the defendant in payment of his stock, and he, therefore, filed a bill in equity, seeking to subject the pledged stock to payment of the defendant's indebtedness to him under the terms of the contract. The bill prayed that an account may be taken and that the defendant may be decreed to pay the complainant whatever may appear to be due of the purchase price of the stock in question, with interest from October 1, 1915, and that in default of payment, the pledged stock may be sold and the complainant paid out of the proceeds of such sale.

After a hearing, a decree was entered in accordance with the prayer of the bill, finding that the defendant, by the terms of the contract, had assumed and agreed to pay the company the amount of the indebtedness of the complainant then appearing upon the books of the company, which was found to be $922.83, and that he had agreed to pay the sum of $5,000.00 less that amount or $4,077.17 to the complainant on or before October 1, 1915. The decree further found that no part of this amount had been paid although the complainant had transferred his stock as agreed. The decree further found that the one hundred shares of stock which were transferred to the defendant by the complainant came into possession of Kellogg, the trustee, and further, that there was due and owing the complainant from the defendant, the sum of $4,389.69, and by the terms of the decree, Kellogg was appointed receiver for the said one hundred shares of stock which the defendant was directed to turn over to him forthwith, and it was further provided that if the defendant did not pay the amount found to be due from him to the complainant,

and still remains the owner and holder of the one hundred shares. The complainant has never received anything from the defendant in payment of the stock, and he, therefore, filed a bill in equity, seeking to subject the pledged stock to payment of the defendant's indebtedness to him under the terms of the contract. The bill prayed that an account may be taken and that the defendant may be decreed to pay the complainant whatever may appear to be due of the purchase price of the stock in question, with interest from October 1, 1918, and that in default of payment, the pledged stock may be sold and the complainant paid out of the proceeds of such sale.

After a hearing, a decree was entered in accordance with the prayer of the bill, finding that the defendant, by the terms of the contract, had assumed and agreed to pay the company the amount of the indebtedness of the complainant then appearing upon the books of the company, which was found to be $[illegible].83, and that he had agreed to pay the sum of $3,000.00 less that amount or $4,[illegible].17 to the complainant on or before October 1, 1918. The decree further found that no part of this amount had been paid although the complainant had transferred his stock as agreed. The decree further found that the one hundred shares of stock which were transferred to the defendant by the complainant came into possession of Hilton, the trustee, and further, that there was due and owing the complainant from the defendant, the sum of $4,380.00, and by the terms of the decree, Hilton was appointed receiver for the said one hundred shares of stock which the defendant was directed to turn over to him forthwith, and it was further provided that if the defendant did not pay the amount found to be due from him to the complainant,

within twenty days, the receiver should proceed to sell the stock and that out of the proceeds of the sale, the receiver should pay the complainant the amount so found to be due. From this decree, the defendant has appealed. Both Kellogg and Baker were made parties defendant and appeared in the trial court, but they have not followed the case here.

The defendant contends that the contract by its terms was insufficient to authorize a sale of the stock at the instance of the complainant alone. It is true that the purpose of the contract and the pledge of the stock which it involved, was for the benefit not only of the complainant, but also of Doose and Frank O'Shea, and also of the creditors, Kewanee Boiler Company and Kellogg-Mackay Company, but the complainant had the right to avail himself of its benefits whether the others chose to or not. As to the three parties of the second part, Reger, the complainant, Frank O'Shea and Doose, the contract is not joint, as contended by the defendant, but is several. By the terms of the contract, each agrees to sell and transfer his stock to the defendant. The interpretation contended for by the defendant, would be correct if the contract provided that <u>all</u> the parties of the second part agreed thateach <u>and every one of them</u> would sell and transfer their stock, but that is not the wording of the contract. As between these three parties of the second part in this contract, there are no mutual obligations, but the contract gives each of them severally, certain rights and any one of them may file a bill to endeavor to get such rights, independent of any action either of the others may or may not take. It further appears that of the two parties of the second part other than the complainant,

within twenty days, the receiver should proceed to sell the stock and that out of the proceeds of the sale, the receiver should pay the complainant the amount so found to be due. From this decree, the defendant has appealed. Both Kellogg and Baker were made parties defendant and appeared in the trial court, but they have not joined the case here.

The defendant contends that the contract by its terms was insufficient to authorize a sale of the stock at the instance of the complainant alone. It is true that the purpose of the contract and the pledge of the stock which it involved, was for the benefit not only of the complainant, but also of Rose and Frank O'Shea, and also of the creditors, Kansas Motor Company and Kellogg-Baker Company, but the complainant has the right to avail himself of its benefits whether the others choose to or not. As to the three parties of the second part, Rose, the complainant, Frank O'Shea and Kellogg, the contract is not joint, as contended by the defendant, but is several. By the terms of the contract, each agrees to sell his share for his share to the defendant. The interpretation contended for by the defendant, would be correct if the contract provided that all the parties of the second part agreed that each and every one of them would sell his share for their stock, but that is not the tenor of the contract. As between these three parties of the second part in this contract, there is no joint obligation, but the contract gives each of them severally, certain rights and any one of them may file a bill in equity to enforce such rights, independent of any action either of the others may or may not take. It further appears that of the two parties of the second part other than the complainant,

Frank O'Shea, has entered his appearance and written consent to the entering of the decree herein, and Doose has never turned over his stock as agreed by him in the contract, and therefore, no rights have accrued to him under the contract. As to the two creditors named, the record shows their indebtedness has been put in the form of notes, all of which have been renewed one or more times as they became due. Thus the complainant has a priority over them as to the pledged stock and they bear the relation of first and subsequent mortgagees, respectively. Schultz v. Plankington Bank, 141 Ill. 116, 122, and cases there cited; Chandler v. O'Neill, 62 Ill. App. 418.

What we have said, disposes of the defendant's further objection that the complainant has omitted necessary parties. The contract being several as to the three parties of the second part and each having his respective rights under the terms of the contract, any one of them may file such a bill as this complainant has filed without joining the others as parties. Although it might be contended that any party of the second part to this contract, who filed a bill, might have to bring in as parties, the other parties of the second part, who had turned their stock over to the party of the first part, as provided by the terms of the contract, this could not extend to any party of the second part who had not so turned over his stock, and who, therefore, had never acquired any rights under the contract as against the trust stock. Doose was, therefore, not a necessary party. If he had acquired an interest in the trust stock by transferring his stock to the defendant, he might be said to be a necessary party. But as he has never done so and still remains the owner and holder of his stock,

Frank O'Shea, has entered his appearance and written consent to the entering of the decree herein, and Moore has never turned over his stock as agreed by him in the contract, and therefore, no rights have accrued to him under the contract. As to the two creditors named, the record shows their indebtedness has been put in the form of notes, all of which have been renewed one or more times as they became due. Thus the complainant has a priority over them as to the pledged stock and they hold the relation of first and subsequent mortgagees, respectively. Schulte v. Plankinton Bank, 161 Ill. 116, 122, and cases there cited; Shandler v. O'Neill, 82 Ill. App. 618.

What we have said, disposes of the defendant's further objection that the complainant has omitted necessary parties. The contract being several as to the three parties of the second part and each having his respective rights under the terms of the contract, any one of them may file such a bill as this complainant has filed without joining the others as parties. Although it might be contended that any party of the second part to this contract, who filed a bill, might have to bring in as parties, the other parties of the second part, who had turned their stock over to the party of the first part, as provided by the terms of the contract, this could not extend to any party of the second part who had not so turned over his stock, and who, therefore, had never acquired any rights under the contract as against the trust stock. Moore was, therefore, not a necessary party. If he had acquired an int rest in the trust stock by transferring his stock to the defendant, he might be said to be a necessary party. But as he has never done so and still remains the owner of his stock,

he is wholly without any interest in the trust property here sought to be reached for the purposes of the trust and one in such a position is never a necessary party. 22 Enc. Pl. & Pr. 122. Frank O'Shea, who did turn over his stock, has filed his appearance and his consent in writing to the entering of the decree, The creditors we have referred to were not necessary parties, for their incumbrances or claims against the pledged stock, were junior to that of the complainant. Chandler v. O'Neill, 62 Ill. App. 418.

The defendant contends further that the evidence does not establish the fact that the stock which was to be delivered to the trustees, was in fact delivered as the decree finds. We have carefully examined the evidence, and believe that it warrants the finding of the chancellor to the effect that the one hundred shares of stock turned over by the complainant to the defendant reached the possession of Kellogg, one of the trustees.

It also seems clear that the one hundred shares of stock turned over to the defendant by Frank O'Shea also reached Kellogg's possession. All of this stock later left his possession (at whose instance is not clear from the record) and came into possession of the company. The other two hundred shares of stock which the defendant agreed to turn over to the trustees by the terms of the contract, never were turned over to them. This, however, is not material, as the only stock affected by the decree entered by the chancellor, is the one hundred shares turned over by the complainant, and which, we believe, the evidence shows came into possession of one of the trustees.

he is wholly without any interest in the trust property here sought to be reached for the purposes of the trust and one in such a position is never a necessary party. 22 Am. Jur. § Pr. 122. Frank O'Shea, who did turn over his stock, has filed his appearance and his consent in writing to the entering of the decree. The creditors we have referred to were not necessary parties, for their incumbrances or claims against the pledged stock, were junior to that of the complainant. Chandler v. O'Neill, 82 Ill. App. 412.

The defendant contends further that the evidence does not establish the fact that the stock which was to be delivered to the trustees, was in fact delivered as the decree finds. We have carefully examined the evidence, and believe that it warrants the finding of the chancellor to the effect that the one hundred shares of stock turned over by the complainant to the defendant reached the possession of Kellogg, one of the trustees.

It also seems clear that the one hundred shares of stock turned over to the defendant by Frank O'Shea also reached Kellogg's possession. All of this stock later left his possession (at whose instance is not clear from the record) and came into possession of the company. The other two hundred shares of stock which the defendant agreed to turn over to the trustees by the terms of the contract, never were turned over to them. This, however, is not material, as the only stock affected by the decree entered by the chancellor, is the one hundred shares turned over by the complainant, and which, as before, the evidence shows came into possession of one of the trustees.

The defendant sought to introduce evidence to support his contention that there was a large indebtedness due the company from the complainant which was in excess of the sum he had agreed to pay the complainant for his stock, but the chancellor sustained objections to this evidence, and these rulings are assigned as error. In our opinion, the rulings were proper. The contract provided that the defendant was to pay to the company "the present individual indebtedness of each of the parties of the second part now appearing upon the books of the said corporation," and by the terms of the contract, he undertook to pay the complainant in consideration for his stock, the sum of $5,000.00 "less whatever amount now appears upon the books of the corporation to be due it from said persons (complainant) according to the statement of said account to be furnished by said corporation as of this date." The evidence establishes that a statement of account, subsequently furnished by the corporation, showed that the books of the company indicated an indebtedness to it from the complainant, as of the date of the contract, amounting to $922.83. There was also evidence to the effect that, at the time the contract in question was drafted and executed by the parties, it was suggested by some one present that in place of the provisions quoted above it would be better to have the contract recite the amounts of the indebtedness of the various parties of the second part to the company and John J. O'Shea, the defendant, was asked what the indebtedness of the complainant Reger, to the company amounted to and that O'Shea replied that he thought it was $886. and some cents, but that he did not know exactly what it was. He objected, however, to the suggestion that the contract set forth the exact amount

The defendant sought to introduce evidence to support his contention that there was a large indebtedness due the company from the capital insert which are in excess of the sum he agreed to pay the complainant for his stock, but the chancellor sustained objections to this evidence, and these rulings are assigned as error. In our opinion, the rulings were proper. The contract provided that the defendant was to pay to the company "the present individual indebtedness of each of the parties of the second part now appearing upon the books of the said corporation," and by the terms of the contract, he undertook to pay the complainant in consideration for his stock, the sum of $3,000.00 "less whatever amount may appear upon the books of the corporation to be due it from said persons (complainant) according to the statement of said account to be furnished by said corporation as of this date." The evidence established that a statement of account, subsequently furnished by the corporation, showed that the books of the company indicated an indebtedness to it from the complainant, as of the date of the contract, amounting to $322.82. There was also evidence to the effect that, at the time the contract in question was drafted and executed by the parties, it was suggested by some one present that in place of the provisions quoted above it would be better to have the contract recite the amount of the indebtedness of the various persons of the second part to the company and [illegible], the [illegible], was asked what the indebtedness of the [illegible], to the company amounted to and that [illegible] that he thought it was $322, and some cents, but that he did not know exactly what it was. He objected, however, to the suggestion that the contract set forth the exact amount

of the indebtedness but insisted that it contain the provisions as above quoted. The statement of the complainant's account with the company which was ultimately furnished, as provided by the contract, and which was introduced in evidence as complainant's exhibit 2, indicated an indebtedness of $886.83 to which was added an item of $36, being an error in the credit of some rent, which was adjusted between the parties after this contract was entered into, making the complainant's total indebtedness to the company $922.83. Any evidence offered to prove that the complainant's indebtedness was in effect something other than the books of the company showed, was inadmissible, in view of the provisions of the contract referred to.

Finding no error in the record, the decree of the Circuit Court is affirmed.

AFFIRMED.

of the indebtedness but insisted that it contain the provisions as above quoted. The statement of the complainant's account with the company which was materially furnished, as provided by the contract, and which was introduced in evidence as complainant's exhibit 2, indicated an indebtedness of $980.65 to which was added an item of $36, being an error in the credit of some rent, which was adjusted between the parties after this contract was entered into, making the complainant's total indebtedness to the company $1022.85. Any evidence offered to prove that the complainant's indebtedness was in effect something other than the books of the company showed, was inadmissible, in view of the provisions of the contract referred to.

Finding no error in the record, the decree of the Circuit Court is affirmed.

AFFIRMED.

546 - 23891

HELEN HOOPER, Administratrix of the Estate of Montgomery C. Hooper, Deceased,
Appellee,

vs.

ADAMS EXPRESS COMPANY, a corporation,
Appellant.

212 I.A. 663

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

In this case Helen Hooper, hereinafter referred to as the plaintiff recovered a judgment against the Adams Express Co., hereinafter referred to as the defendant for the sum of $2500.00 after a verdict by a jury finding the defendant guilty of negligence resulting in injuries to her husband, Montgomery C. Hooper which caused his death. From that judgment the defendant has appealed, contending that the verdict and judgment are contrary to the manifest weight of the evidence in that it established that the deceased was guilty of contributory negligence at the time of receiving his injuries and also that there was no negligence on the part of the defendant's servant.

A wagon belonging to the defendant and driven by one of its servants was going west in Madison street about six o'clock in the evening. Upon reaching Fifth avenue (now Wells street) this vehicle was halted by the passing of the north and south traffic at that intersection.

When the crossing policeman blew his whistle

HENRY HOOPER, Administrator of the Estate of Montgomery C. Hooper, deceased,

Appellee,

vs.

ADAMS EXPRESS COMPANY, a corporation,

Appellant.

212 I.A. 663

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

In this case Helen Hooper, hereinafter referred to as the plaintiff recovered a judgment against the Adams Express Co., hereinafter referred to as the defendant for the sum of $5000.00 after a verdict by a jury finding the defendant guilty of negligence resulting in injuries to her husband, Montgomery C. Hooper which caused his death. From that judgment the defendant has appealed, contending that the verdict and judgment are contrary to the manifest weight of the evidence, in that it established that the deceased was guilty of contributory negligence in the manner of receiving his injuries and also that there was no negligence on the part of the defendant's servant.

A train leaving [illegible] was driven by one of its servants [illegible] about six o'clock in the evening. [illegible] avenue (no [illegible] passing of the north and south [illegible] section.

When the crossing policemen blew his whistle

halting the north and south traffic and signaling the east and west traffic to proceed the defendant's servant started up his horse and proceeded across Fifth avenue in a westerly direction. He seems to have been driving in the west bound car track or nearly so.

While the east and west traffic had been halted the deceased and a companion had approached the intersection from the west walking along the south side of Madison street; upon reaching a point at or near the southwest corner of the intersection the deceased and his companion turned north and walked in a general northerly direction toward the northwest corner of the intersection. In doing this they passed immediately in front of an east bound street car and behind a wagon both of which were halted in the east bound car track, the wagon in question being the first vehicle in the east bound line which was halted by the passing of the north and south bound traffic in Fifth avenue.

As the deceased and his companion emerged from between the street car and the wagon and stepped out toward the west bound car track the horse and wagon driven by the defendant's servant bore down upon them.

The testimony seems to establish that both men jumped in a northerly direction to escape being struck and as they did so the wagon driver testified that he shouted a warning and endeavored to pull in his horse and stop his vehicle. Before he could do so, however, the north shaft struck the companion of the deceased, who was a witness at the trial, and knocked him over on to the sidewalk and the deceased was also knocked

Waiting the north and south traffic and crossing the east and west traffic to proceed the defendant's servant started up his horse and proceeded across Fifth avenue in a westerly direction. He seems to have been driving in the west bound car track or nearly so.

While the east and west traffic had been halted the deceased was a companion and approaching the intersection from the west walking along the north side of Madison street; upon reaching a point at or near the northwest corner of the intersection he discovered his companion turned north and walked in general northerly direction towards the northwest corner of the intersection. In doing this they passed immediately in front of an east bound street car and behind a wagon both of which were halted in the east bound car track. The wagon in question being the first vehicle in the east bound line which was halted by the opening of the north and south bound traffic in Fifth avenue.

As the deceased and his companion emerged from between the street car and the wagon [illegible] toward the west bound car track [illegible] by the defendant's servant [illegible].

The testimony [illegible] turned in a northerly direction to cross [illegible] and as they did so the wagon which [illegible] sounded a warning and endeavored [illegible] and stop the vehicle. Before [illegible] the north bound street car [illegible] who was a witness at the trial, [illegible] on to the sidewalk and the deceased was also [illegible]

down and run over, receiving injuries from which he shortly died.

There is considerable discrepancy in the testimony of the witnesses as to the speed of the express wagon. Without detailing the evidence further, it is sufficient to say that there was evidence in the record from which the jury might properly find that the wagon was proceeding at a rate of speed which amounted to negligence under the circumstances and there is also evidence in the record from which the jury might properly find that in crossing the street as he did, and under all the circumstances present at the time, the deceased was not guilty of contributory negligence. There being sufficient evidence in the record to justify the verdict of the jury on both of these points it should not be disturbed and the trial court did not err in entering this judgment upon it. The judgment of the Circuit Court will therefore be affirmed.

AFFIRMED.

down and run over, receiving injuries from which he shortly died.

There is considerable discrepancy in the testimony of the witnesses as to the speed of the express wagon. Without detailing the evidence further, it is sufficient to say that there was evidence in the record from which the jury might properly find that the wagon was proceeding at a rate of speed which amounted to negligence under the circumstances and there is also evidence in the record from which the jury might properly find that in crossing the street as he did, and under all the circumstances present at the time, the deceased was not guilty of contributory negligence. There being sufficient evidence in the record to justify the verdict of the jury on both of these points it cannot not be disturbed and the trial court did not err in entering the judgment upon it. The judgment of the trial court in it will therefore be affirmed.

AFFIRMED.

546 - 23891

HELEN HOOPER, Administratrix of the Estate of Montgomery C. Hooper, Deceased, Appellee, vs. ADAMS EXPRESS COMPANY, a corporation, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

In this case Helen Hooper, hereinafter referred to as the plaintiff recovered a judgment against the Adams Express Co., hereinafter referred to as the defendant for the sum of $2500.00 after a verdict by a jury finding the defendant guilty of negligence resulting in injuries to her husband, Montgomery C. Hooper which caused his death. From that judgment the defendant has appealed, contending that the verdict and judgment are contrary to the manifest weight of the evidence in that it established that the deceased was guilty of contributory negligence at the time of receiving his injuries and also that there was no negligence on the part of the defendant's servant.

A wagon belonging to the defendant and driven by one of its servants was going west in Madison street about six o'clock in the evening. Upon reaching Fifth avenue (now Wells street) this vehicle was halted by the passing of the north and south traffic at that intersection.

When the crossing policeman blew his whistle

548 - 23091

HELEN HOOPER, Administratrix of the Estate of Montgomery G. Hooper, Deceased, Appellee,	
vs.	APPEAL FROM
ADAMS EXPRESS COMPANY, a corporation, Appellant.	DIRECT TO SC. COOK COUNTY.

MR. JUSTICE THOMAS delivered the opinion of the court.

In this case Helen Hooper, hereinafter referred to as the plaintiff recovered a judgment against the Adams Express Co., hereinafter referred to as the defendant for the sum of $2500.00 after a verdict by a jury finding the defendant guilty of negligence resulting in injuries to her husband, Montgomery G. Hooper which caused his death. From that judgment the defendant has appealed, contending that the verdict and judgment are contrary to the manifest weight of the evidence in that it established that the deceased was guilty of contributory negligence at the time of receiving his injuries and also that there was no negligence on the part of the defendant's servant.

A wagon belonging to the defendant [illegible] driven by one of its servants was being used in [illegible] about six o'clock in the evening. Upon reaching 61st avenue (now Kells street) this wagon was [illegible] by the passing of the north and south trolley [illegible] section.

When the crossing gateman saw the vehicle

halting the north and south traffic and signaling the east and west traffic to proceed the defendant's servant started up his horse and proceeded across Fifth avenue in a westerly direction. He seems to have been driving in the west bound car track or nearly so.

While the east and west traffic had been halted the deceased and a companion had approached the intersection from the west walking along the south side of Madison street; upon reaching a point at or near the southwest corner of the intersection the deceased and his companion turned north and walked in a general northerly direction toward the northwest corner of the intersection. In doing this they passed immediately in front of an east bound street car and behind a wagon both of which were halted in the east bound car track, the wagon in question being the first vehicle in the east bound line which was halted by the passing of the north and south bound traffic in Fifth avenue.

As the deceased and his companion emerged from between the street car and the wagon and stepped out toward the west bound car track the horse and wagon driven by the defendant's servant bore down upon them.

The testimony seems to establish that both men jumped in a northerly direction to escape being struck and as they did so the wagon driver testified that he shouted a warning and endeavored to pull in his horse and stop his vehicle. Before he could do so, however, the north shaft struck the companion of the deceased, who was a witness at the trial, and knocked him over on to the sidewalk and the deceased was also knocked

halting the north and south traffic and signaling the east and west traffic to proceed the defendant's servant started up his horse and proceeded across Fifth avenue in a westerly direction. He seems to have been driving in the west bound car track or nearly so.

While the east and west traffic had been halted the deceased and a companion had approached the intersection from the west walking along the south side of Madison street; upon reaching a point at or near the southwest corner of the intersection the deceased and his companion turned north and walked in a general northerly direction toward the northwest corner of the intersection. In doing this they passed immediately in front of an east bound street car and behind a wagon both of which were halted in the east bound car track, the wagon in question being the first vehicle in the east bound line which was halted by the passing of the north and south bound traffic in Fifth avenue.

As the deceased and his companion emerged from between the street car and the wagon he stepped out toward the west bound car track the horse and wagon driven by the defendant's servant being upon them.

The testimony seems to establish that both men jumped in a northerly direction to escape being struck and as they did so the wagon driver terrified at, as he shouted a warning and endeavored to pull in his horse and stop his vehicle. Before he could do so, however, the north bound attack the companion of the deceased, who was a witness at the trial, and knocked him over on to the sidewalk and the deceased was also knocked

down and run over, receiving injuries from which he shortly died.

There is considerable discrepancy in the testimony of the witnesses as to the speed of the express wagon. Without detailing the evidence further, it is sufficient to say that there was evidence in the record from which the jury might properly find that the wagon was proceeding at a rate of speed which amounted to negligence under the circumstances and there is also evidence in the record from which the jury might properly find that in crossing the street as he did, and under all the circumstances present at the time, the deceased was not guilty of contributory negligence. There being sufficient evidence in the record to justify the verdict of the jury on both of these points it should not be disturbed and the trial court did not err in entering this judgment upon it. The judgment of the Circuit Court will therefore be affirmed.

AFFIRMED.

down and run over, receiving injuries from which he shortly died.

There is considerable discrepancy in the testimony of the witnesses as to the speed of the express wagon. Without detailing the evidence further, it is sufficient to say that there was evidence in the record from which the jury might properly find that the wagon was proceeding at a rate of speed which amounted to negligence under the circumstances and there is also evidence in the record from which the jury might properly find that in crossing the street as he did, and under all the circumstances present at the time, the deceased was not guilty of contributory negligence. There being sufficient evidence in the record to justify the verdict of the jury on both of these points it should not be disturbed and the trial court did not err in entering this judgment upon it. The judgment of the circuit court will therefore be affirmed.

AFFIRMED.

411 - 23756

MATHILDA K. FORD,
Appellee,

vs.

FRANK J. FORD et al.,
FRANK J. FORD,
Appellant.

1461

212 I.A. 663

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McDONALD
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Frank J. Ford, one of the defendants below (hereinafter referred to as the appellant), from a decree setting aside a redemption made by him from a master's sale in a foreclosure proceeding under a trust deed made by appellee and Percy J. Ford, her husband, since deceased. The right of redemption was asserted by appellant as a judgment creditor of the said Percy J. Ford, his brother, on a note for $5,000.00 alleged to have been signed by the said Percy J. Ford as maker, shortly before his death.

The transcript of the record filed herein contains the original deposition of appellant which was filed in the trial court. This fact is brought to our attention by counsel for appellee in their brief, and it is contended that inasmuch as a deposition filed in a chancery case becomes part of the record and a court of review may consider only a transcript of the record, the said deposition must be here excluded from consideration and the decree affirmed. Counsel for appellant have made a counter motion in this court, supported by proper affidavit, to detach from the record the original deposition hereinabove referred to and to substitute in lieu thereof a transcript duly certified by the clerk of the trial court. Consideration of these motions was reserved to the hearing.

[illegible] - 22756

[illegible] R. [illegible], appellee,

vs.

[illegible] J. LONG et al.,

[illegible] J. LONG,

appellant.

[illegible]

DELIVERED [illegible]

This is an appeal [illegible]
defendants below [illegible]
from a decree [illegible]
Kohler's main is a [illegible]
[illegible] by appellee and [illegible]
[illegible] concerned. The [illegible]
as a judgment creditor [illegible]
on a note for [illegible]
said Corey J. Long as [illegible]

The [illegible]
the original [illegible]
trial court. [illegible]
for [illegible] in their [illegible]
as a dependent child [illegible]
record and [illegible]
the record, the [illegible]
[illegible] and the [illegible]
have made a [illegible]
affirmed, [illegible]
herein were referred [illegible]
transcript only [illegible]
Consideration of these [illegible] to [illegible]

It appears that appellant's praecipe directed the clerk of the circuit court to incorporate in the record a transcript of the deposition in question, and that the clerk erroneously incorporated the original deposition instead. Appellant's motion to detach the said original deposition from the record and to substitute in lieu thereof a duly certified transcript, may be regarded as being in effect a motion suggesting diminution of the record and asking leave to supply the deficiency. This he would have the undoubted right to do. Thomas v. O'Brien Lumber Co., 185 Ill. 374.

The remaining question here presented for determination relates to the sufficiency of the evidence to support the decree.

It appears that for upwards of four years prior to the death of the aforesaid Percy J. Ford, appellee had been living separate and apart from him without fault on her part; that on July 17, 1913, a decree was entered in the circuit court of Cook County, whereby complainant was granted separate maintenance and, among other things, the right to occupy the premises here in controversy, subject to the aforesaid incumbrance. On appeal this decree was affirmed by the Appellate court, and a further review thereof denied by the Supreme court on petition for certiorari; that an appeal was also prosecuted to this court from an order requiring the said Percy J. Ford to pay complainant temporary alimony pending disposition of the first appeal, which said order was likewise affirmed.

It further appears from the testimony of several witnesses (of whose credibility the chancellor was in a better position to judge than we) that the said Percy J. Ford had, on several occasions stated that he would arrange his affairs so that his wife (appellee) would not share in his estate, in the event of his death; that he assigned his life insurance to appellant, and that he died on January 21, 1917, leaving about $500 in personal property.

[illegible]

place of the [illegible] in [illegible]

transaction of the [illegible]

erroneously [illegible]

Appellant's [illegible]

the record [illegible]

transaction, [illegible]

dismissing [illegible]

This be [illegible]

Number [illegible].

[illegible]

relates [illegible]

[illegible]

death of [illegible]

appeal [illegible]

July 17, 1[illegible]

[illegible]

among [illegible]

very, [illegible]

was [illegible]

denied [illegible]

appeal [illegible]

the [illegible]

[illegible]

affirm[illegible].

[illegible]

manner of [illegible]

position [illegible]

[illegible]

that [illegible]

[illegible]

appellant, [illegible]

[illegible] in personal property.

Because of the evasive and vague character of appellant's testimony, it is difficult to determine what, if anything, formed the basis and consideration of the note and judgment upon which he predicated his right to redeem the aforesaid premises. The chancellor, in setting aside the said redemption, was evidently of the opinion that the judgment upon which appellant's right was based, was without consideration and therefore invalid; and from a careful examination of the record, we are clearly of the opinion that his finding was amply warranted.

Accordingly the decree will be affirmed.

AFFIRMED.

Because of the evasive and tenuous [illegible] of appellant's testimony, it is difficult to [illegible] anything, formed the basis and consideration of the [illegible] judgment upon which he predicated his right to [illegible] aforesaid premises. The commissioner, in making [illegible] said redemption, was actuated by the opinion that the judgment upon which appellant's right was based, [illegible] consideration and [illegible] examination of the record, [illegible] that his finding was amply [illegible].

Accordingly the [illegible] affirmed.

APPROVED.

441 - 23786

212 I.A. 663

M. A. SCHOLBE,
Appellant,

vs.

MAX SCHUCHARDT et al.,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

In this suit brought on a promissory note payable on demand to plaintiff's order for $1250, dated January 28, 1907, against Max Schuchardt, the maker, and his wife, Frieda, an endorser, the verdict and judgment were for defendants.

Their affidavit of defense pleaded in effect an original consideration of the note and a contemporaneous agreement that payment thereof was to be made conditional, and it is argued by appellees that such defense and the proof adduced in support thereof show a failure of consideration.

The affidavit sets forth with unnecessary and irrelevant detail the entire transaction and a parol agreement, the substance of which is as follows: That on the date of the note appellant purchased at the price of $1250, 5000 shares of the treasury stock of the Regina Mining & Milling Co., though said Max Schuchardt, its agent, who at the same time personally agreed to repurchase the stock or cause it to be repurchased at the same price, provided it did not thereafter pay a dividend, and that said note was given merely as evidence of that agreement; but in case of a dividend or such repurchase the note was to

M. A. SCHULZE,

Appellant,

vs.

MAX SCHUCKMAN et al.,

Respondents.

Appeal from [illegible]

[illegible]

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

In this suit brought on a promissory note [illegible] on demand to plaintiff's order for $1500, dated [illegible] 1907, against two defendants, the [illegible] Frieda, on another, the various judgments were for defendants.

Their affidavit of [illegible] in support of original consideration of the [illegible] contains recitals agreement that payment should [illegible] and it is proved by witnesses [illegible] proof adduced in support thereof [illegible] of consideration.

The affidavit sets forth with [illegible] irrelevant detail [illegible] agreement, the [illegible] on the [illegible] note [illegible] of $1250, [illegible] Mining & Milling Co., [illegible] agent, who at the [illegible] the stock or [illegible] provides it did not [illegible] note was given [illegible] in case of [illegible]

be surrendered and cancelled; and that such was the meaning of the words "This note is given to secure 5000 shares of Regina stock," which appear on the face of the note below the maker's signature; and that two dividends were paid within a short time afterwards, and that thereafter Max Schuchardt demanded back the note, and appellant refused to return it.

Evidence was received in support of this defense over plaintiff's objection that the note by its terms was payable absolutely, and that parol evidence of the alleged contemporaneous agreement that payment was contiggent upon the happening of future events, varied the terms of the note, and was therefore, under the well known general rule, not admissible. But appellee urges that such evidence comes within the exception of the general rule on two grounds, (1) because it shows a failure of consideration, and (2) because the recital is explainable as being an ambiguous or incomplete statement of the actual contract.

Neither position is tenable. Neither the pleading nor the evidence showed a failure of consideration, but merely that the note was payable on condition, contrary to its express terms, and, as a negotiable instrument, it was complete and not qualified or rendered conditional or uncertain, either as to the time of payment or the sum to be paid, by a mere reference on its face to the transaction out of which it arose. It is expressly provided by the Negotiable Instrument Act, that an unqualified promise to pay is unconditional "though coupled with * * * a reference to the transaction which gives rise to the instrument." Ch. 98, Sec. 3, J. & A. Ann. Stats. par. 7642. (See also

be surrendered and cancelled; [illegible] of the words "this note is [illegible] Regina stock," [illegible] the maker's signature; [illegible] within a short time [illegible] Salmonbank [illegible] to return it.

Evidence was [illegible] defence over plaintiff's objection [illegible] terms was probable [illegible] the alleged contemporaneous [illegible] contingent upon the [illegible] terms of the note, and [illegible] general rule, not [illegible] such evidence comes within the [illegible] rule on two grounds, (1) [illegible] consideration, and (2) [illegible] as being an [illegible] contract.

[illegible] ing nor the [illegible] merely [illegible] its express terms, and [illegible] complete [illegible] certain, either [illegible] paid, by [illegible] out [illegible] Negotiable Instruments [illegible] pay a sum [illegible] to the [illegible] ch. 32, [illegible]

Siegel et al. v. Ch. Tr. Sav. Bk., 131 Ill. 569; Ridgely Bank v. Patton et al., 109 id. 479; Beckstrom v. Krone, 125 Ill. App. 376.)

There is a clear distinction between a mere agreement for a conditional payment, that does not relate to the original consideration, and facts tending to show a failure of consideration. The defense here recognizes that there was an original consideration for the note, and is nothing more than a claim that by oral agreement (which merged in the written agreement) the note contrary to its terms was to be paid only upon a contingency. In this respect the case is not different from Schultz v. Meyer, 181 Ill. App. 335, recently decided by us, and the cases there cited.

Appellee's contention that some of the earlier cases bearing on this subject were overruled by Great Western Ins. Co. v. Rees, 29 Ill. 272, is a misapprehension, that case merely holding that the general rule laid down in Lane v. Sharp, 3 Scam. 566, has no application to the defense of a want or failure of consideration. But the evidence here did not show a failure of consideration. It showed that the original consideration which has never failed, that induced appellant to buy and pay for the stock, was not the delivery of the stock alone but also of said note. And, on the other hand, the consideration inducing the execution of the note was to get appellant to take and pay for the stock which Max Schuchardt, as agent or otherwise, was manifestly interested in selling. These facts were not changed by the fact the stock paid a dividend. Neither party was to do or receive anything additional as a part of the original consideration, as was the fact in

Stogel et al. v. U. S. Sup. Ct., 1931 M.L. [illegible]; Hughes v. Burton et al., 1[illegible] [illegible]; Lockwood v. [illegible], 128 [illegible]. Ga. '72.)

There is a [illegible] distinction [illegible] agreement for a [illegible] to the [illegible] a failure of [illegible] that [illegible] and is [illegible] (which [illegible]) the [illegible] to its terms [illegible] this [illegible] Meyer, 1[illegible] [illegible] cause there [illegible].

[illegible] case [illegible] Western Inc. [illegible] that [illegible] Lane v. [illegible] defense of a [illegible] evidence [illegible] showed that [illegible] failed, [illegible] was not [illegible] note. [illegible] the execution [illegible] pay for [illegible] mine, [illegible] were not [illegible] Either [illegible] a part of [illegible]

the several cases cited by appellee where parol evidence was held admissible. (See Hill v. Enders, 19 Ill. 162; Morgan v. Hallenstein, 27 id. 31; Great Western Ins. Co. v. Rees, 29 id. 272; Jones v. Buffum, 50 id. 277; Mann v. Smyser, 76 Ill. 365.) We are also cited to Straus v. Citizens Bank, 254 id. 185, but the controlling feature of that case is that the evidence showed a total want of consideration.

As was said in Penny v. Greeves, 12 Ill. 287, the question is: "Did the evidence offered in this instance go to impeach the consideration of the note, or to vary its terms? If the former, it ought to have been admitted; if the latter, it was properly excluded." And what was also said applies to this case: "The effect of the parol evidence was to show that the note, although absolute in its terms, was in fact conditional."

Other cases applying the same rule are Harlow v. Russell, 15 id. 56; Foy v. Blackstone, 31 id. 538; Harris v. Galbraith, 43 id. 309; Weaver v. Fries, 85 id. 356; Mumford v. Tolman, 157 Ill. 258. Other cases of the Supreme Court and this court might be cited, but the chief difficulty, as said by Mr. Justice Trumbull in the Penny case is "not so much in determining what the law is, as in applying it to the particular case."

We do not think the controlling facts here are distinguishable from those of the cases last cited. They do not tend to show a legal defense, and the court should have granted plaintiff's motion for a directed verdict, and on failure so to do, should have granted his motion for judgment non obstante veredicto.

[illegible]

[illegible]

[illegible] v. [illegible]

[illegible]

[illegible]

[

Neither the execution nor the amount of the note with interest was questioned, and neither the defense pleaded or attempted to be proven was a legal defense, and it is conceded by appellee that if we reach such a conclusion we are not in such a case required to remand but can reverse and enter judgment for the face of the note with interest at 6%, as specified therein, amounting at this time to $2125. Accordingly the judgment will be reversed and judgment for that amount will be entered here.

REVERSED AND JUDGMENT
HERE FOR $2125 AND COSTS.

[illegible]

[illegible] with interest and questions, [illegible] [illegible] or attempted to be proven [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] are not in [illegible] [illegible] [illegible] [illegible] and under jurisdiction [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

48 - 23939

148a

212 I.A. 663

JONAH PULLMAN and M. M. KALIKOW,
co-partners doing business as
Pullman and Kalikow,

Defendants in Error,

vs.

ELIAS HACKNER and KOLMAN HACKNER,
co-partners doing business as
Hackner Bros.,

Plaintiffs in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendants to recover for 159 pairs of pants, sold to the defendants, claiming $139.13. There was a credit of $1.75 on this account, making a net claim of $137.38. The defendants filed an affidavit of set-off, claiming a balance due them of $373. The case was tried before the court without a jury, there was a finding and judgment in favor of plaintiffs for $137.38, to reverse which defendants prosecute this writ of error.

The record discloses that plaintiffs manufactured pants in New York City; that defendants were engaged in business in Chicago, selling pants and other clothing; that on August 17, 1915, plaintiffs agreed to sell to the defendants and the latter agreed to purchase 154 dozen pairs of pants to be delivered in installments. The contract provided that payments were to be made within 60 days after delivery with a discount of two per cent. After the delivery of February 2, 1916, of the 159 pairs of pants, plaintiffs refused to make any further deliveries until payment had been made for the pants already delivered. This the defendants refused to do,

stating that they would not pay the bill until the balance of the order had been filled. There was correspondence between the parties, the bill was not paid, nor any other goods delivered, and this suit was brought.

One of the plaintiffs testified that shortly before the goods were sent, one of the defendants promised to pay cash upon receipt of the goods. This was denied by the defendants. There is no dispute, however, as to the amount of plaintiffs' bill, and the only contention is that the court should have allowed the defendants' set-off. The defendants contend the law is well settled that the measure of damages to the purchaser of goods where there is failure of delivery is the difference between the contract price and the market price at the time and place the delivery should have been made. Some of the deliveries were by the contract to have been made in February, March, April and May, 1916, and therefore to ascertain the damages, it was incumbent on the defendants to prove the market price of the pants in these several months. One of the defendants testified covering this phase of the matter. He further testified, however, that on account of plaintiffs' failure to fill the order, he bought goods in Philadelphia and New York, but he was unable to state the quantity of goods purchased, or what he paid for them. Manifestly this evidence was too indefinite and uncertain upon which to base any damages the defendants might have suffered, and the court was therefore warranted in entering judgment for the plaintiffs for the amount of their claim, and in disregarding the set-off.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

stating that they would not pay the bill until the balance of the order had been filled. There was correspondence between the parties, the bill was not paid, but many stores goods delivered, and this suit was brought.

One of the plaintiffs testified that shortly before the goods were sent, one of the defendants promised to pay cash upon receipt of the goods. This was denied by the defendants. There is no dispute, however, as to the amount of plaintiffs' bill, and the only questions is that the court should have allowed the defendants' set-off. The defendants contend the jury in well noticed that the measure of damages to the purchaser of goods where there is failure of delivery is the difference between the contract price and the market price at the time and place the delivery should have been made. Some of the deliveries were by the contract to have been made in February, March, April and May, 1916, and therefore to substantiate the charge, it was incumbent on the defendants to prove the market price of the goods in those several months. One of the witnesses testified covering this phase of the matter. He further testified, however, that on account of plaintiffs' failure to fill the order, he bought goods in Philadelphia and New York, but he was unable to state the quantity of goods purchased, or what he paid for them. Manifestly this evidence was too indefinite and uncertain upon which to base any damages. The defendants might have waived, also, the court was justifiable warranted in entering judgment for the plaintiff for the amount of their claim, and in disregarding the set-off.

The judgment of the municipal court of Orange is affirmed.

AFFIRMED.

90 - 24002

PHYLLIS DRUEEN and FORT DEARBORN TRUST AND SAVINGS BANK, Administrator of the Estate of ROBERT W. SUNASACK, JR., Deceased,

Plaintiffs in Error,

vs.

WINIFRED SUNASACK, WINIFRED SUNASACK, Administratrix of the Estate of ROBERT W. SUNASACK, SR., Deceased, R. W. SUNASACK COMPANY, (a corporation), and I. HORWEEN, Trustee,

Defendants in Error.

212 I.A. 664

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR delivered the opinion of the court.

Complainants filed their bill in the Circuit Court of Cook County, asking that it be decreed that certain personal property held by some of the defendants belonged to the estate of Robert W. Sunasack, Sr., deceased. After a hearing before the chancellor the bill was dismissed for want of equity, and complainants prosecute this writ of error.

The theory of the complainants was that Robert W. Sunasack, Sr., in his lifetime was the owner of certain personal property; that he died intestate possessed of the same; that Winifred Sunasack, his daughter, was appointed administratrix of his estate by the Probate Court of Cook County, qualified and was acting as such; that she claimed that it was not the property of her father's estate but belonged to her individually; that Phyllis Drueen and Robert W. Sunasack, Jr., were also

PHYLLIS BURKEN and TOBY BURKEN-
BROCK LUNT and MARION HAIR,
Administrator of the Estate
of ALBERT E. BURKEN, D.D.S.,
Deceased,

Plaintiff-in-Error,

vs.

WINIFRED LUNSFORD, WALTER G.
BURKEN, Administrator of
the Estate of [illegible] E. LUN-
SFORD, JR., Deceased, [illegible]
COMPANY, (a corporation), [illegible]
WREN, Trustee,

Defendants-in-Error.

FISIA. 664

[illegible]

opinion of the court.

[illegible] Court of [illegible] certain personal [illegible] belonged to the [illegible] After a hearing [illegible] mined for want of [illegible] this writ of error.

[illegible] W. Burkeen, [illegible] this [illegible] of [illegible] appointed and [illegible] Court of [illegible] that the [illegible] father's estate but [illegible] Phyllis Burken and [illegible]

children of Robert W. Sunasack, Sr., deceased; that since the death of the father, the son has died intestate, and the Fort Dearborn Trust and Savings Bank was appointed administrator of his estate by the Probate Court of Cook County; that the personal property involved in the litigation should be decreed to belong to the estate of the father, against whose estate there were no claims, so that it could ultimately be divided between the father's heirs, namely, Phyllis Drueen and Winifred Sunasack, his surviving daughters. The defendant Winifred Sunasack claimed that the property which is the subject-matter of the suit was given to her by her father in his lifetime for services which she rendered to him.

The record discloses that for several years prior to the father's death he was engaged in business in Chicago; that he incorporated the business under the name of R. W. Sunasack Company, and thereafter it was conducted by him in substantially the same manner as before the corporation was formed; that the company was incorporated for $10,000, and 100 shares of the par value of $100 each were issued; that afterwards the father who owned all of the stock, transferred 50 shares to his daughter Phyllis and 49 shares to his daughter Winifred, retaining only one share; that a few days afterwards, on account of the delicate health of his daughter Phyllis, he had her return the 50 shares of stock to him, and it was reissued to his daughter Winifred, so at the time of his death 99 shares of the stock were in Winifred's name and one share in the name of her father; that afterwards the corporation made an assignment of all its assets for the benefit of its creditors; that the

its assets for the benefit of its creditors; [illegible]
that subsequently the son [illegible]
in distributing [illegible] of;
so as the time of his death [illegible]
stock to him, and [illegible]
his wife for alimony, he had [illegible]
daughter Mildred, [illegible]
so weaken to the daughter [illegible]
wards the father and [illegible]
of the per value of [illegible]
compromise issue [illegible] for [illegible]
manner as before [illegible] clearly; [illegible]
it was accepted by him in [illegible] well, [illegible]
the name of [illegible] company, [illegible]
in Chicago; that on [illegible] corporate [illegible]
prior to the family [illegible] speed [illegible]
for services which [illegible] to him.

The [illegible] defendant [illegible]
that the property with [illegible] which the
suit was given it [illegible] by the father in his lifetime
[illegible]

assignment was made to the defendant I. Horween, as trustee; that he sold all of the assets for the benefit of the creditors and distributed the proceeds among them, paying them about eighty-five per cent of their claims; that all of the assets were insufficient to pay the creditors. Horween was not made a party defendant, but upon petition, was admitted by the court and filed his answer.

During the trial it was contended by the complainants that there was other personal property, as well as the 99 shares of stock, which belonged to the deceased father at the time of his death, but the contest finally involved only the shares of stock. Counsel for complainants in his brief states that the real question is: "Was Robert W. Sunasack at the time of his death the real owner of the corporate stock of the R. W. Sunasack Company held in the name of Winifred Sunasack?" A great deal of testimony was introduced on both sides, but in the view we take of the case, it will be necessary to discuss but little of it. A witness on behalf of the complainants testified that just before the transfer of the stock by the father to the daughters, he had been sued for damages on account of an automobile accident, and so as to prevent the collection of any recovery that might be obtained against him, the stock was transferred. The chancellor in rendering his decision stated that he believed little of the testimony offered by the defendants. He said: "If the evidence of the defendant is to be taken as true, these certificates were given to Winifred I don't believe that testimony, but if it

assignment was made to the secretary [illegible],
as trustee; that he sold all of [illegible] for the
benefit of the creditors [illegible] distribution the pro-
ceeds among them, paying the [illegible] twenty-five
per cent of their claims; [illegible] were insufficient to pay in [illegible]. Greene
was not under a [illegible] obligation,
was admitted by the court [illegible].

During the trial it was [illegible] by the
complainants that there was [illegible] personal property,
as well as the 99 shares of stock, which [illegible] to
the defendant father [illegible], the
the central [illegible] amount [illegible].
Counsel for complainants in his opinion [illegible]
real question [illegible] of his death the real [illegible]
of the [illegible]. [illegible] Simpson [illegible]
Hinfred [illegible]? [illegible] introduced in [illegible], but [illegible]
the case, [illegible] of it. [illegible]
fied [illegible]
father to [illegible]
account of [illegible]
vant [illegible]
[illegible]
[illegible]
believe [illegible]
[illegible]
to be taken as true, [illegible]
Hinfred. I don't believe [illegible]

is true, then the bill must be dismissed for want of equity because the property belongs to Winifred instead of Robert W. Sunasack. I don't believe that this is true. The evidence consists simply of the fact that the certificates were in her possession, and of the testimony of two witnesses, who claimed to have had a conversation with Robert W. Sunasack to the effect that he had given these certificates to Winifred. But the truth is, and the undisputed fact that they left Robert Sunasack with only one share of stock. This corporation was all he had, substantially, and I don't believe that he gave away ninety-nine per cent of his property, and at the same time he was there acting as president and general manager and exercising full control. The circumstances would indicate that it is a mere sham. That the stock was put in her hands to keep it out of the hands of creditors from attacking it. Now, the complainant in this case sues as an heir of Robert W. Sunasack for the benefit of the heirs -- for the benefit of the creditors, but in the meantime I am concerned at the same time with the objection made that the complainant has no right to sue for herself or the heirs of the estate. She stands simply in the shoes of Robert W. Sunasack and he himself could not recover back his stock, it it was transferred for this purpose."

We are entirely satisfied with the reasons given and the conclusions reached by the chancellor.

is true, then the bill mentioned [illegible]
equity because the property belonging to [illegible]
stand of respect [illegible]. Don't believe that
this is true. The evidence [illegible] of the
fact that the particulars [illegible]
and of the testimony of [illegible], [illegible]
to have had a conversation [illegible]
to the effect that [illegible]
winfred. And the last [illegible]
that they left [illegible]
of steam. [illegible]
tiall, and I don't believe [illegible]
by-line per [illegible]
time he was the [illegible]
manner [illegible]
attorney [illegible]
the state was not [illegible]
basis of [illegible]
plaintiff [illegible]
business for [illegible]
benefit [illegible]
contract [illegible]
the [illegible]
[illegible]
of [illegible]
[illegible]
[illegible]

[illegible]
[illegible]

We think the transfer was a mere sham to prevent the creditors from obtaining satisfaction of any claim they might have. It has long been the law of this state that a party cannot deliberately put his property out of his control for a fraudulent purpose, and then, through the intervention of a court of equity, regain the same after the fraudulent purpose has been accomplished; and this rule applies not only to him, but to his heirs and assigns. Jolly v. Graham, 222 Ill. 550.

The decree of the Circuit Court of Cook County, dismissing the bill for want of equity, is affirmed.

AFFIRMED.

We think the transfer was a mere ploy to prevent the creditors from obtaining satisfaction of any claim they might have. It has long been the law of this state that a party cannot deliberately put his property out of his control for a fraudulent purpose, and then, through the intervention of a court of equity, regain the same after the fraudulent purpose has been accomplished; and this rule applies not only to him, but to his heirs and assigns. Jolly v. Jenkins, 222 III. 380.

The decree of the Circuit Court of Cook County, dismissing the bill for want of equity, is affirmed.

AFFIRMED.

4 - 23161

THE SWEDISH HOME BUILDING ASSOCIATION, a corporation,

Defendant in Error,

vs.

ISABELLA PATTON, ET AL.,

Plaintiffs in Error.

212 I.A. 664

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On November 6, 1914, the complainant, The Swedish Home Building Association, a corporation, filed a bill of complaint to foreclose a mortgage. The latter was dated June 3, 1910, and was executed by the defendant, Isabella Patton, and was given to secure a promissory note, signed by her, and for the sum of $3700.00. On January 20, 1915, the default of the defendant, Isabella Patton, and other defendants, was entered and the cause was referred to a Master in Chancery to take proofs and report the same together with his findings and his conclusions of law. On March 26, 1915, the Master's report was filed. It recited, among other things, that there was due from the defendants to the complainant the sum of $4611.36, and it recommended that the prayer of the bill be granted and a decree be entered in accordance therewith. On March 26,1915, a decree of foreclosure was entered and on April 28, 1915, an order was entered confirming the Master's report of sale and distribution. The latter recited a deficiency of $394.39, and directed that an execution be issued therefor. On May 4, 1915, Otto W. Peterson was appointed receiver of the property des-

cribed in the bill of complaint and in the mortgage and was authorized to rent and repair the premises; and his bond was fixed at $1,000. On December 8, 1915, a writ of assistance was ordered and issued in favor of the receiver and against the defendants, Isabella Patton and Anna M. Patton. On September 18, 1916, upon a petition of the receiver, wherein it appeared that he had received $151.00 in rent and had expended $339.64 for repairs, taxes and court costs, leaving a deficiency of $178.64, which deficiency had been paid by the complainant, the receiver was released and discharged.

Twelve contentions are made. We shall take them up seriatim:

(1) The contention that there are not sufficient allegations of fact in the bill of complaint is obviously untenable. Of course it is well known that it is not necessary to plead all the evidence. We have examined the bill of complaint and find that it contains sufficient allegations of fact to base the decree upon.

(2) and (3) Inasmuch as the defendants did not appear and present any defense it became unnecessary for the complainant to allege or prove that the certificate of its incorporation had been filed within two years.

(4) In the bill of complaint it was alleged that the complainant was a corporation organized under the Homestead and Loan Association Act of Illinois and doing business in the City of Chicago. That was a sufficient allegation of its corporate existence and as no defense was set up it was unnecessary for the complainant to introduce proof of that fact.

(5) and (6) What has been said in regard to con-

[illegible] in the bill of indictment and in the [illegible] was authorized to [illegible] fixed at [illegible] was [illegible] the defendants, [illegible] September 18, 1944, [illegible] it appears [illegible] pandas [illegible] for [illegible] a definitive [illegible] the [illegible]

[illegible] are [illegible] as follows:

(1) [illegible] allegations of fact in the [illegible] unlawful [illegible] agency [illegible] of [illegible] of fact to make the [illegible]

(2) [illegible] appear [illegible] some [illegible] incorporated [illegible]

(3) [illegible] [illegible] [illegible]

tentions 2, 3 and 4, is a complete answer to these contentions.

(7) In the copy of the constitution and by-laws which were offered in evidence, it is provided, in section 11, as follows: "All loans shall bear interest at the rate of 7½% per annum." The Master's report finds among other things that the by-laws - which include section 11 - have been duly approved by the Attorney General of the State of Illinois and recorded in the Recorder's office of Cook County as required by the statute. Under the circumstances we are bound to hold that the by-laws were legally enacted and binding.

(8) The evidence is to the effect that the loan was duly made in conformity with the by-laws, the constitution and the statutes of the State.

(9) and (10) On April 28, 1915, a deficiency decree in the sum of $394.39 was entered against the defendant, Isabella Patton, and an execution ordered issued on May 4, 1915; one Peterson was appointed receiver of the property and authorized to rent the premises and collect rents, etc., and give bonds in the sum of $1,000.00. Counsel for the defendants claims that it was error not to require the complainant to give bond "to secure the appointment of a receiver." Under section 53, chapter 22 of Hurd's Revised Statutes it is provided that "bond need not be required when for good cause shown and upon notice and full hearing the court is of the opinion that a receiver ought to be appointed without such bond." From that, it follows, in the instant case, we are entitled to assume that the receiver was appointed, without requiring a bond from the complainant, for good cause shown.

tentions 2, 3 and 4, in a complete answer to in [illegible]-
tions.

(7) In the body of the [illegible] and by-laws which were offered in evidence, it is provide, in section 11, as follows: "All loans shall bear interest at the rate of 7½% per annum." The material report finds among other things that the by-laws [illegible] have been duly approved by the [illegible] of the State of Illinois and recorded in the [illegible] county as required by the statute. Under the circumstances we are bound to hold that the by-laws were legally enacted and binding.

(8) The [illegible] duly made in conformity with the by-laws, [illegible]-tion and in accordance of the statute.

(9) and (10) [illegible] May 4, 1910, [illegible] degree in the sum of [illegible] [illegible]-ment, [illegible] fraud, and [illegible] May 4, 1910, one [illegible] [illegible] party and [illegible] to [illegible] [illegible] etc., and give bonds in the sum of [illegible] [illegible] [illegible] complainant, [illegible] [illegible] [illegible] [illegible] statutes [illegible] [illegible] for some [illegible] [illegible] [illegible] [illegible]

(11) The mortgage provided for solicitor's fees and the Master found that the complainant had incurred indebtedness for attorney's and solicitor's fees, and that $250.00 was a fair, reasonable and customary fee for the services rendered. Also, the bill of complaint recited a resolution of the complainant which directed Alfred A. Norton to institute proceedings of foreclosure and provided that the costs and expenses of the foreclosure and the compensation of Alfred A. Norton should not exceed $300.00. It follows, therefore, that the general rule that where the legal services are gratuitously rendered, as where an attorney sues for himself; or an administrator, as a lawyer, sues for the benefit of the estate; or a trustee sues in that capacity; or an owner acts as his own solicitor in a partition suit, solicitors fees may not be allowed, is not applicable in the instant case. Although the solicitor here was the secretary of the complainant, still he was ordered by the resolution of the complainant to institute and prosecute foreclosure proceedings and the complainant bound itself - up to a liability of $300.00 - for solicitor's fees and costs. Gale v. Carter, 154 Ill. App. 478. Under those circumstances there was no error in allowing solicitor's fees.

Finding no error in the record, the decree is affirmed.

AFFIRMED.

(ii) The mortgage provides for mortgagee's fees and the Master found that the complainant had incurred disbursements for attorney's and solicitor's fees, and that these were a fair, reasonable and economy for the services rendered. Also, the bill of complaint contains a recognition of the complainant's claimed right to institute proceedings of foreclosure and provided that the costs and expenses of the foreclosure and the conveyancing of Alfred A. Norton should not exceed $100.00. It follows, therefore, that the general rule that the legal services are gratuitously rendered, so that an attorney sues for himself; or a solicitor, or a proctor, sues for the benefit of the certain; or a trustee sues in that capacity; or an owner sues on his behalf; or a partition suit, solicitors fees are not allowed, is not applicable in the instant case. Although the solicitor here was the secretary of the complainant, suit was brought by the resolution of the complainant in [illegible] and proceeds foreclosure proceedings. [illegible] bound itself - up to a liability of $100.00 - for a reasonable fee and costs. Vide v. Jarvis, 108 Ill. App. 572. Under these circumstances there can be no error in allowing a reasonable fee.

Finding no error [illegible], the decree is affirmed.

451 - 23796

MARGARET McFARLANE, Admx. of the Estate of Alice Emeline McFarlane, Deceased,

Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,

Appellant.

212 I.A. 664

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE TAYLOR DELIVERED THE OPINION OF THE COURT.

Owing to the death of one Alice McFarlane, which it is alleged was caused by certain injuries sustained by her while alighting from one of the defendant's cars, the plaintiff, Margaret McFarlane, brought suit to recover for the pecuniary loss alleged to have been sustained by the next of kin. A verdict and judgment for $2500. and costs were obtained and this appeal is taken therefrom.

About six o'clock P.M. on December 3, 1913, Mrs. Alice McFarlane, 57 years of age, a widow, was a passenger on an eastbound 47th street car - which was operated by the defendant - and, just after the car left Grand Boulevard going east, she arose and went to the rear platform and said to the conductor that she wished to get off at Vincennes avenue, which was the next street east. The conductor pulled the bell and she got off or fell off and was injured.

Two questions arise; first, was the injury caused by the negligence of the defendant without con-

MARGARET MCNAMARA, Admx. of the Estate of Alice Weeling McNamara, Deceased,	
Appellee,	APPEAL FROM
vs.	SUPERIOR COURT,
CHICAGO CITY RAILWAY COMPANY,	COOK COUNTY.
Appellant.	

212 I.A. 664

MR. JUSTICE TAYLOR DELIVERED THE OPINION OF THE COURT.

Owing to the death of the plaintiff, Alice McNamara, which it is alleged was caused by wrongful negligence sustained by her while alighting from one of defendant's cars, the plaintiff, Margaret McNamara, brought suit to recover for the pecuniary loss she claimed to have been sustained by the death of her. A verdict and judgment for $2500. and costs were obtained and this appeal is taken therefrom.

About six o'clock p. m. on December 3, 1919, Mrs. Alice McNamara, 37 years of age, a widow, was a passenger on an eastbound Ashland car - which was operated by the defendant - and, in alighting from car left Grand Boulevard going east, she came to west to the rear platform and fell to the street. It appears that she wished to get off at Ashland Avenue, and was the next stop. The conductor pulled the bell and she got off to fall on the pavement.

Two questions arise: first, was the injury caused by the negligence of the conductor without con-

tributory negligence on the part of the deceased; second, was her death "caused by wrongful act, neglect, or default" of the defendant.

First: It is claimed by the defendant that the verdict on the question of negligence and contributory negligence was against the manifest weight of the evidence. From the record it appears that but two witnesses - the conductor and one White - actually saw Mrs. McFarlane fall from the car. The evidence of White is to the effect that he was on the rear of the car and as the car crossed Grand Boulevard Mrs. McFarlane went to the door and asked for Vincennes avenue; that the conductor was counting his transfers and pulled the bell for Vincennes avenue and the car stopped; that she pulled the door open and meanwhile the conductor kept counting his transfers; that she stepped out on the platform, stepped down on the next step, took hold of her dress with one hand and held the iron with the other; that the conductor pulled the bell and the motorman started just as she went to put her foot on the ground, and she fell; that she did not have time to get both feet on the ground; that the car started with a kind of a jerk; that the bell was rung before she had her feet off the car; that she fell about 60 or 70 feet West of Vincennes avenue.

The evidence of Thornton, the conductor, is to the effect that after crossing Grand Boulevard, Mrs. McFarlane stepped out on the back platform and asked for Vincennes avenue; that he gave one bell to stop and that the car was going along slowly; that she stepped out when the car was about 100 feet west of the corner of Vincennes; that he put his hand on her shoulder and told her to wait

tributory negligence on the part of the deceased; secondly, was her death "caused by wrongful act, neglect, or default" of the defendant.

First: It is claimed by the defendant that the verdict on the question of negligence was contributory negligence was against the manifest weight of the evidence. From the record it appears that but two witnesses - the conductor and one White - actually saw Mrs. McFarlane fall from the car. The evidence of White is to the effect that he was on the rear of the car and the car crossed Grand Boulevard two. McFarlane went to the door and asked for Vincennes avenue; that the conductor was counting his transfers and called the bell for Vincennes avenue and the car stopped; that she pulled the door open and meanwhile the conductor kept counting his transfers; that she stepped out on the platform, stepped down on the next step, took hold of her dress with one hand and held the strap with the other; that the conductor pulled the bell and the motorman started just as she went to put her foot on the ground, and she fell; that she did not have time to get both feet on the ground; that the car started with a kind of a jerk; that the bell was rung before she had her foot off the car; that she fell about 60 or 70 feet west of Vincennes avenue.

The evidence of Morgan, the conductor, is to the effect that after crossing Grand Boulevard, Mrs. McFarlane stepped out on the rear platform and asked for Vincennes avenue; that he rang one bell, a stop; that the car was going along slowly; that she stepped off when the car was about 10 feet west of the corner of Vincennes; that he put his hand on her shoulder to take her transfer

until the car came to a full stop; that Mrs. McFarlane stepped off the car; that he immediately gave three bells to stop the car and that the car stopped within about 15 feet; that it went about 15 or 50 feet after she stepped off; that when she fell, she fell forward in a heap, and seemed simply to sit down; that the car was going about seven miles an hour at the time she asked to get off at Vincennes and about three miles an hour at the time she got off; that when the car came to a standstill it was about 50 feet from Vincennes.

The evidence of the motorman and the two witnesses, Monroe and Monigan, is to the effect that one bell was given after the car passed Grand Boulevard and that no other bell was sounded until the three emergency bells were given and that no stop was made from the time the car left Grand Boulevard until the three bells were given. The evidence is slightly conflicting as to the distance between the car in question and the car which was running ahead of it, but all of them place it at not less than 100 feet.

The foregoing resume of the evidence shows that the critical question is one of credibility as between White on the one hand and the conductor on the other. If the testimony of the former was believed by the jury then the verdict of the jury must stand. Although there appear to be slight discrepancies here and there as to the speed of the car, the distance it ran after the injury; its relative distance from the car which was preceding it; and the ringing of the different bells; we are unable to find anything of sufficient

until the car came to a full stop; that Mr. McFarlane stepped off the car; that he immediately rang three bells to stop the car and that the car stopped within about 15 feet; that it went about 15 or 20 feet after the stopped off; that when she fell, she fell forward in a heap, and seemed simply to sit down; that the car was going about seven miles an hour at the time she asked to get off at Vinegrove and about three miles an hour at the time she got off; that when the car came to a standstill it was about 5 feet from Vinegrove.

The evidence of the motorman and the two witnesses, Morse and Morgan, is to the effect that one bell was given after the car passed Vinegrove and that no other bell was sounded until the three bells were given and that no stop was made from the time the car left Grand Bolaverd until the three bells were given. The evidence is slightly conflicting as to the distance between the car in question and the car which was running ahead of it, but all of them place it at not less than 10 feet.

The foregoing resume of the evidence shows that the critical question is one of credibility as between this on the one hand and the motorman on the other. If the testimony of the former was believed by the jury then the verdict of the jury must stand. Although there appear to be slight discrepancies in their as to the speed of the car, the distance after the injury; the relative [illegible] which was preceding it; and the turning of the different bells; we are unable to find any [illegible] of substantial

weight and importance to justify the conclusion that the jury obviously was not justified in believing White; and it follows, therefore, that the verdict as to liability must stand.

Second. The statute, (Chap.70) upon which this suit is based, recites that; "whenever the death of a person shall be caused by wrongful act, neglect, or default", etc., the wrongdoer shall be liable in an accident for damages for the benefit of the next of kin. It is necessary therefore to determine whether the death of Mrs. McFarlane was caused by the wrongful act complained of. After she fell from the car she was placed in an automobile and taken home. Part of the time she was unconscious. The evidence of Dr. Carter, who was in the vicinity at the time of the accident, is to the effect that he placed her in his car and drove her home to 415 East 46th street; that at the time he helped to pick her up she was in considerable distress and quite helpless; that when he got her into her home he made an examination and found a fracture of the patella of the right knee, a fracture of the phalanx or the second bone of the second finger of the left hand, and considerable injury to the left shoulder and the left thorax region; that he applied splints to the finger and a compress and a binder to the left thorax and put her leg in a cast; that he saw her thereafter at intervals, making in all from 20 to 25 calls; that she continued to complain of her side and suffered frequently from attacks of syncope; that she had difficulty in getting her breath and at intervals would drop into a condition of unconsciousness; that injuries to the chest wall would

weight and importance to justify the conclusion that the jury obviously was not justified in believing it; and it follows, therefore, that the verdict as to liability must stand.

Second. The statute, Comp. St. [illegible], upon which this suit is based, provides that, whenever the death of a person shall be caused by wrongful act, neglect, or default, etc., the wrongdoer shall be liable in an action for damages for the benefit of the next of kin. It is necessary therefore to determine whether [illegible] Mrs. McFarlane was caused by the wrongful act complained of. After she fell from the car she was placed in an automobile and taken home. [illegible] the time she was wrongfully [illegible]. The evidence of Dr. [illegible], who was in the vicinity at the time of the accident, is to the effect that [illegible] her in his car and drove her home [illegible]; that at the time he helped [illegible] in a nervous condition [illegible] considerable distress and quite [illegible]; that when he got her into her home [illegible] fracture of the patella of the [illegible] the phalanx of the [illegible] the left foot, and considerable injury to [illegible] and the left thorax [illegible] liquor and a compress [illegible] put her leg in a cast; [illegible] cataract, making in all [illegible] attended to complaints [illegible] from attacks of vomiting; [illegible] her breath and it laboured [illegible] of unconsciousness; that injuries to the chest wall [illegible]

cause such a condition; that there was a decided congestion of the left lung and congestion of the heart; that he called to see her twenty or twenty-five times; that for the first month she was in bed and after that at times up in a chair; that the finger healed up but the union in the patella bone was not complete at the time of her death; that the cast was on her knee approximately four or five weeks.

The evidence of Dr. Springer, a witness called by the defendant, is to the effect that he held a post mortem on the body of the deceased January 14, 1914; that she was a woman about 57 years of age and weighed 200 pounds or more; that on opening the left knee he found that the knee cap was all bound down by adhesions; that he found two factures of the knee cap which had united and a granulation tissue had formed around it; that he found the lungs were congested; that he found she was suffering from myocarditis; that he found other organs exceedingly congested and fatty; chronic gastritis of the stomach, and the kidneys congested; that he found myocarditis, arterio sclerosis, fatty degeneration of the heart and congestion of the kidneys. When asked his opinion he stated that she came to her death from an organic heart disease complicated by the injuries which she showed.

The evidence of the witness Margaret McFarlane, the daughter of the deceased, is to the effect that her mother, after the injury and not before, had frequent fainting spells and gasped for breath; that they started the next day after the accident; that prior to the injury

cause such a condition; that there was a decided congestion of the left lung and congestion of the heart; that he called to see her twenty or twenty-five times; that for the first month she was in bed and after that at times up in a chair; that the finger nailed up but the union in the patella bone was not complete at the time of her death; that the cast was on her knee approximately four or five weeks.

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The evidence of the witness Barnett, a friend, the daughter of the deceased, is to the effect that her mother, after the injury and not before, had frequent fainting spells and gasped for breath; that they started the next day after the accident; that prior to the injury

she did her work and never complained of illness; that afterwards she was unable to get up and do her work; that she had not been ill during the last five years prior to the accident and never had any fainting spells or complained of trouble with her heart; that the cast was kept on her leg almost to the time of her death.

The injury took place on December 3, 1913, and her death 40 days afterward, January 13, 1914. The obvious result of the fall was a broken finger, a fractured patella and an injury to the left thorax region. The opinion of Dr. Springer - called by the defendant - although expressed with, perhaps, some ambiguity, seems to be that she died of a combination of disease and the effect of the injuries caused by the fall. The cause of death was a question of fact and the jury has concluded that death was caused by the injuries. Was there sufficient evidence to justify that conclusion? Considering that she was a woman weighing 200 pounds; that she had been well and had not been attended by any physician for a number of years and was strong enough todo, alone, all the household work of a seven room apartment with a family of five persons (which included two roomers); that after the injury she became unconscious, was taken home and put to bed, where she remained practically all the time until her death; that she suffered from an injured knee which was put in a cast which remained on until within a few days of her death; that her left shoulder and left thorax region were injured by the fall; that she complained of her side, and had difficulty in getting her breath and at intervals would drop into unconsciousness; that injuries to the chest

drop into unconsciousness; that assistance to the chest
difficulty in getting her breath and a number in sound
by the fall; that she complained of pain in the chest
that her left shoulder and left thorax region were injured
which remained so until within a few days of her death;
she suffered from an injured knee which had not [illegible] a most
unconscious, was taken home and put to bed, where she
remained practically all the time until her death; that
prior to the accident and never had any fainting spells
or complained of trouble with her heart; that the cast
was kept on her leg almost to the time of her death.

The injury took place on December 3, 1913,
and her death 46 days afterward, January 13, 1914.
The obvious result of the fall was a broken finger, a
fractured patella and an injury to the left thorax re-
gion. The opinion of Dr. Springer - called by the de-
fendant - although expressed with, perhaps, some un-
clearness, seems to be that she died of a combination
of disease and the effect of the injuries caused by
the fall. The cause of death was a question of fact
and the jury has concluded that death was caused
by the injuries. Was there sufficient evidence to justi-
fy that conclusion? Considering that she was a woman
weighing 200 pounds; that she had been well and had not been
attended by any physician for a number of years and was
strong enough to do, alone, all the household work of a
seven room apartment with a family of five persons (which
included two roomers); that after the injury she became
unconscious, was taken home and put to bed, where she
remained practically all the time until her death; that
she suffered from an injured knee which had not [illegible] a most
which remained so until within a few days of her death;
that her left shoulder and left thorax region were injured
by the fall; that she complained of pain in the chest
difficulty in getting her breath and a number in sound
drop into unconsciousness; that assistance to the chest

wall would cause such a condition; that there was congestion of the left lung and of the heart; that it was necessary for her to be attended almost daily by a physician; that after the injury, and throughout the 40 days she lived after the injury, she had frequent fainting spells and gasped for breath; we are of the opinion that - although a post mortem examination showed myocarditis, arterio sclerosis, fatty degeneration of the heart and congestion of the kidneys - the evidence sufficiently supports the verdict of the jury that her death was caused by the injuries suffered at the time of the fall.

It is contended by the defendant that the damages allowed are excessive. Of course, there is no exact rule or standard whereby they may be measured. City of Chicago v. Keefe, 114 Ill. 222. Just exactly what pecuniary loss is suffered by two adult children, when their mother dies, is incapable of ascertainment. Under the circumstances of this case, however, although we have in mind no clearly defined method of determination, we are unable to hold that the amount fixed by the jury is wrong.

It is contended that error was committed in giving an instruction which contained the words, "for such pecuniary loss and personal service she would have rendered them, if any, as shown by the evidence, as the children of the deceased have sustained" etc. Instructions 25 and 26, however, given on behalf of the defendant, emphasized the exact limitations of the law on that subject, that is, the pecuniary loss, and when read with number eight, it cannot reasonably be

well would cause such a consequence; that there was consideration of the left leg on the ground; that it was necessary for her to be carried [illegible] in light physician; that after the injury, [illegible] the [illegible] the living [illegible] the injury, [illegible] specially and caused [illegible] - although a point medical [illegible] arterio sclerosis, fatty degeneration [illegible] the heart; no congestion of the stomach - the [illegible] sufficiently support the verdict of the jury that her death was caused by the injuries suffered at the time of the fall.

It is contended by the [illegible] that the damages allowed are excessive. [illegible] is no exact rule or standard whereby [illegible] can be measured. [illegible] Chicago v. Liebig, 114 Ill. [illegible] [illegible] pecuniary loss is sustained by the small [illegible] their mother died, it is impossible to [illegible] under the circumstances of this case. [illegible] we have in mind no clearer [illegible] [illegible] we are unable to hold [illegible] in error.

[illegible] that [illegible] giving [illegible] - good [illegible] such pecuniary loss [illegible] have expected that, [illegible] as in [illegible] instructed [illegible] the [illegible] law in this subject. [illegible] when read with number [illegible] it [illegible]

claimed that the jury were mislead.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

ointed that the jury were misled.

Finding no error in the record, the judgment
is affirmed.

AFFIRMED.

- 24509

212 I.A. 664

CATHERINE DAY,

Appellee,

vs.

D. T. FLETCHER, ET AL
On appeal of BLACK DIAMOND
OIL COMPANY, a corp.,

Appellant.

INTERLOCUTORY APPEAL
FROM THE CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 29, 1918, Catherine Day the complainant - appellee - filed her bill of complaint charging the Black Diamond Oil Company, A. C. McClaughery, L. W. Young and certain others with conspiracy to deceive and cheat her in the sale of certain alleged fictitious and worthless shares of stock in the Black Diamond Oil Company. The bill prays among other things for an injunction to restrain the defendants from collecting or receiving certain moneys on deposit in certain banks in Chicago and elsewhere in the name of the Black Diamond Oil Company, and from disposing of any of the property of the Black Diamond Oil Company.

On June 29, 1918, without notice to the defendants, but pursuant to a motion of the complainants for the appointment of a receiver for the property of the Black Diamond Oil Company within the jurisdiction of the court and to the recommendation of a Master in Chancery, an order was entered appointing Jacob G. Goldman receiver of all the properties and assets of every kind of the Black Diamond Oil Company, and providing for a bond on the part of the receiver in the sum of $3,000. and on the part of the complainant in the sum

of $200. On July 1, 1918, the receiver's bond was approved and on July 2, 1918, that of the complainant. On July 6, 1918, counsel entered the appearance of the defendants, L. W. Young, A. C. McClaughery and the Black Diamond Oil Company for "the special purpose of moving to vacate the order theretofore entered appointing a receiver * * * for the defendant Black Diamond Oil Company." On July 8, 1918, a petition was filed by the defendant, A. C. McClaughery, reciting certain facts with regard to notice and giving certain reasons for the discharge of the receiver, and praying "that the order heretofore entered appointing a receiver for the said Black Diamond Oil Company be set aside and vacated and the receiver discharged." On July 9, 1918, on motion of the solicitors for the defendants, A. C. McClaughery, L. W. Young and the Black Diamond Oil Company "to vacate the order heretofore entered appointing a receiver for the Black Diamond Oil Company * * * and that said receiver be discharged", it was ordered that the motion to vacate the order appointing said receiver be denied.

On August 1, 1918, it was ordered that the appeal bond which was presented by the Black Diamond Oil Company, A. C. McClaughery and L. W. Young, "be filed and approved by the clerk of the court." On the same day an appeal bond signed by the Black Diamond Oil Company, A. C. McClaughery and L. W. Young and LLoyd M. Brown was approved by the clerk of the court. The condition of the bond is that whereas Catherine Day on the 29th day of June, 1918, secured the appointment of a receiver for the assets of the Black Diamond Oil Company and "the said court did on the 9th day of July, 1918, deny the motion of said the Black Diamond Oil Company (a corp.) A. C. McClaughery and L. W. Young to vacate the order

of [illegible]. On July 1, 1918, [illegible] was approved and on July 8, 1918, [illegible] the [illegible] [illegible], 1918, [illegible] A. C. McKinnery and the [illegible] [illegible] special purpose of moving to [illegible] [illegible] stored machinery [illegible] [illegible] Diamond Ill. Company." On July 1, 1918, [illegible] was filed by the department, A. C. McKinnery, [illegible] with regard to motors and [illegible] [illegible] charge of the [illegible], [illegible] stated [illegible] company be set aside [illegible] [illegible] on July 8, 1918, on motion of [illegible] for [illegible] A. C. McKinnery, [illegible] "to vacate the order [illegible] for the [illegible] be discharged." It was ordered [illegible] order [illegible] [illegible].

On [illegible] 1, 1918, [illegible] done which was presented [illegible] A. C. McKinnery [illegible] by the clerk of the court." [illegible] signed by [illegible] and [illegible] of the [illegible] [illegible] [illegible] [illegible] 1918, [illegible] (a corp.) [illegible]

appointing said receiver, from which said order * * * the said Black Diamond Oil Company (a corp.) A. C. McClaughery and L. W. Young, have prayed for and obtained an appeal to the Appellate Court * * * now therefore", etc.

Counsel for the defendants urge first, that on the face of the bill the complainant was not entitled to the appointment of a receiver; second, that the franchise of a corporation cannot be attacked collaterally; and, third, that it is error to appoint a receiver without notice. On the other hand it is contended by the complainant that the record before us gives rise to but one question and that is whether an order overruling a motion to set aside an order appointing a receiver is appealable. The latter contention is not discussed in the brief of the defendants, although, in our opinion it is decisive of the case. The right of appeal from an interlocutory order appointing a receiver is created and provided for by Section 123, Chap. 110, Hurd's Rev. Stat. It is there provided that an appeal from an interlocutory order appointing a receiver may be taken within 30 days from the entry of such an order or decree. In the instant case the order appointing the receiver was entered on June 29, 1918, and the appeal bond was not filed until August 1, 1918. It follows, therefore, that this can not, in any view, be considered as an appeal under the aforesaid section. We are, therefore, compelled to consider that which it evidently is intended to be, as described in the motion, order of the court and appeal bond, namely, an appeal from the interlocutory order of July 9, 1918, denying the motion to vacate the order appointing the receiver. In Richenbaum Plumbing Company, Petition, 77 Ill. App. 363, Mr. Presiding Justice Adams said "the order overruling the motion to set aside the order appoint-

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appellate, said you very, [illegible] the
said Black Diamond [illegible] (a corp.) [illegible]
L. W. Young, have [illegible] for adoption [illegible] the
Appellate Court [illegible] of [illegible], etc.

[illegible]
the face of the [illegible]
the [illegible]
of a [illegible]
that is [illegible]
the other [illegible]
[illegible]
is which [illegible]
[illegible]
is not [illegible]
in our [illegible]
appeal [illegible]
[illegible]
Nev. [illegible]
[illegible]
30 days [illegible]
[illegible]
June [illegible]
1, 1910. [illegible]
view, [illegible]
[illegible]
by [illegible]
court [illegible]
order of July 1, 1910, [illegible]
[illegible]
petition, 27 [illegible]
"the order overruling [illegible] motion to set aside the order [illegible]

ing the receiver is not an appealable order."

Further, although the appeal bond recites that an appeal "was prayed for and obtained" nowhere in the record does it appear that an appeal was either prayed for or obtained. Under the circumstances, the appeal must be dismissed.

APPEAL DISMISSED.

ing the receiver is not an appealable order."

Further, although the appeal bond recites that an appeal "was prayed for and obtained" months in the record does it appear that an appeal was either prayed for or obtained under the circumstances, the appeal must be dismissed.

APPEAL DISMISSED.

18 - 23484

212 I.A. 0

LOUIS NEHRING, by Henry Otto,
his guardian,

Defendant in Error,

vs.

MINNIE H. NEHRING, LUCILLE HOLMES
and OLIVER SMITH,

Plaintiffs in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the three defendants, Minnie H. Nehring, Lucille Holmes and Oliver Smith, seek to reverse a decree by which the trial court annulled the marriage of Louis Nehring, the original complainant and Minnie H. Nehring, on the ground of the insanity of said complainant at and previous to the time of the marriage, and further directed the three defendants to pay Henry Otto, as guardian for the said Louis Nehring, the said Henry Otto having been substituted as party complainant after the suit was started, the sum of $2,275.00, interest and costs, within thirty days. The decree appealed from also gave the said Otto, as guardian for the said Louis Nehring, a lien upon a piece of real estate which had been purchased by the defendant, Minnie H. Nehring, with the funds in question and directed that in default of compliance with the money decree, said realty or so much thereof as might be necessary for the purpose of satisfying the decree, should be sold at public sale by a master in chancery. The decree also annulled any instrument in writing, which had

19 - 23164

LOUIS KEMPNER, by [illegible], 1920.
Bill quieting.

Petitioner in error,

vs.

MINNIE S. KEMPNER, Individually
and [illegible] CHITT,

Defendants in error.

court.

[illegible] Kempner, [illegible] a decree by [illegible] of Louis Kempner, [illegible] Kempner, on the ground of the [illegible] and as and previous to [illegible] their divorce [illegible] quieting for the [illegible] having been [illegible] suit was filed, [illegible] within ninety days. [illegible] said time, [illegible] upon a plea of [illegible] the defendant. [illegible] time and [illegible] money decree, [illegible] necessary for the [illegible] be [illegible] by [illegible] case also annulled and [illegible] [illegible]

been executed by Louis Nehring, purporting to release and relinquish all his rights in and to, money turned over by him to the defendant, Minnie H. Nehring and also all property which she might own or possess.

As to that part of the decree annulling the marriage, it is the contention of the defendant, Minnie H. Nehring, that it should be reversed by reason of the fact that it finds that the complainant, Louis Nehring, was insane at the time of said marriage, and previous thereto, and annuls the marriage upon that ground, whereas there is not a sufficient allegation of insanity in the bill as amended, to support such a decree. We have carefully considered the allegations of the bill, in this regard and while they may be said to be inartificial in their phraseology, we deem them sufficient to support the decree in this respect. The amended bill alleges that "by reason of extreme old age, senile dementia, weak and enfeebled mind * **," the complainant did not "know, realize, or understand the object, purpose and consequences of the marriage engagement * * *," into which it is alleged the defendant, Minnie H. Nehring, persuaded him to enter. It is further alleged in the bill, that the complainant was "lacking the mental capacity to make and engage in the subject of said contract, with a mind sufficient for the purpose, under the laws of the State of Illinois." We are of the opinion that this refers to the marriage contract. The evidence has not been preserved in the record but presumably it was such as to warrant the finding which was made, by the chancellor in the decree, as to the complainant's insanity, at and before the time of the marriage.

As to the money decree, it is contended that it is erroneous by reason of the fact that the bill did not allege

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been executed by [illegible] during [illegible] it [illegible]
relationship [illegible]
him to the [illegible] [illegible]
which [illegible] [illegible].

As to [illegible] it is [illegible] that it should be [illegible] by reason of the fact that [illegible] the complainant, [illegible] marriage, and [illegible] that ground, whether [illegible] insanity in the [illegible] we have [illegible] this regard [illegible] their phraseology, [illegible] before in [illegible] reason of [illegible] mind [illegible] stand the [illegible] [illegible] Hinds [illegible] altogether in the [illegible] mental [illegible] contract, [illegible] line of [illegible] this [illegible] been [illegible] argument [illegible] course, [illegible] time of [illegible].

As to the [illegible] convenience by reason of the fact that the gift [illegible] nature

that the defendant, Holmes, got any of the money in question, nor was there any evidence to that effect, and the decree does not find that she did, and further because the bill only charged the defendant Smith, with getting $600.00 and the decree makes a finding to the effect that he got $800.00, and that the defendant Rehring, got $1,475.00, and the contention is that at most the respective defendants could only be required to return such amounts as they may have received, as found by the decree, whereas the decree directs all of them to return the full amount.

The bill charges the three defendants with an unlawful conspiracy to bring about a marriage between the complainant and the defendant, Rehring, and by that means defraud the complainant out of all his property and money. The bill goes into some detail as to the different parts taken by the several defendants in the prosecution of this conspiracy, and the decree makes proper findings of fact to the effect that these allegations are true. That being the case, the decree properly directs a return of the full amount which the complainant is shown to have been damaged as a result of the conspiracy, and fixes the liability of all of the defendants for that amount, irrespective of just how much each of them may have personally profited as a result of the conspiracy. The defendants are charged in the bill with having conspired in the unlawful acts complained of, and the decree is to the effect that they did engage in the acts charged, to the damage of the complainant, as alleged, and they are therefore, jointly and severally liable for the injury resulting to the complainant and the damages sustained

that the defendant, Malone, got any of the money in question, nor was there any evidence to that effect. The jury decree does not find it. The bill, and further, does not the bill only charged the defendant with, with intent to, and the jurors make a finding to the effect that [illegible] $300.00, and that the defendant obtained, but $1,675.00, and the motion in that at least the requisite defendants would only be required to return such money as they have received, as found by the jury, whether the jurors direct all of them to return the full amount.

The bill charges the [illegible] wilful conspiracy [illegible] be run by complainant and the [illegible] defraud the complainant of all [illegible]. The bill goes into some [illegible] taken by the several [illegible] conspiracy, and the jurors [illegible] to the office [illegible] the money, the jurors are only [illegible] money which [illegible] an [illegible] all of the [illegible] have been [illegible] result of the conspiracy. [illegible] the bill [illegible] of, and the [illegible] the acts charged, to the [illegible] and they are [illegible] injury resulting to the [illegible]

by him. Batman v. Cook, 120 Ill. App. 203, 207; Doremus v. Hennessy, 176 Ill. 608; Miller v. John, 208 Ill. 173; Furington v. Winchliff, 219 Ill. 159; Franklin Union v. The People, 220 Ill. 355, 377.

Finding no error in the record the decree will be affirmed.

AFFIRMED.

by him. Belden v. Moor, 180 Ill. 49, 203, 207; Murphy v. Hennessy, 176 Ill. 608; Miller v. Kane, 203 Ill. 175; Hawkins v. Mitchell, 210 Ill. 139; Franklin Union v. The People, 220 Ill. 385, 391.

Finding no error in the record the decree will be affirmed.

AFFIRMED.

39 - 23854

212 I.A. 665

MARY FALLON,

Plaintiff in Error,

vs.

CITY OF CHICAGO,

Defendant in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

In this action the plaintiff sought to recover damages alleged to have been suffered by him for personal injuries, caused by the negligence of the defendant. After all the evidence was in, defendant moved to strike it out on account of a variance between the allegations of the declaration and the proof. This motion was allowed and the plaintiff was given leave to file an additional count, which he did instanter. The defendant pleaded the general issue to this additional count, and also filed a special plea, setting up the statute of limitations. The plaintiff demurred to this last plea and his demurrer was overruled. Thereupon, on the defendant's motion, the court directed a verdict of not guilty and judgment was entered for the defendant.

In appealing from this judgment the plaintiff contends, that the trial court erred in allowing the motion to strike out the evidence on the grounds of a variance, and also in overruling his demurrer to the defendant's plea of the statute of limitations.

SIRIA. 665

The original declaration charged that the defendant "negligently and carelessly failed to provide and furnish the plaintiff with reasonably safe appliances, and a reasonable safe derrick with which to work at the time and place aforesaid, in that the said derrick was defectively constructed and one of the supports of the derrick was weak, rotten, broken and insecurely fastened and was wholly insufficient for the uses and purposes for which the plaintiff was required to use it, * * * so that * * * the derrick suddenly gave way, causing one of the supports to break, by reason of its defective construction as above set forth, falling upon the left shoulder of this plaintiff, breaking the collar bone * * *."

The evidence tended to prove that on the occasion in question, the derrick mentioned in the declaration, was being used to lower a large valve into a ditch, in connection with some water pipe extension work being done by the city, and that the plaintiff was in the employ of the defendant and engaged, with others, in the operation of the derrick, which consisted of three legs, two of them, connected by means of a cross piece, being located on one side of the ditch and the third leg being located on the other side of the ditch. The three legs were joined together at the top where there was a block and tackle rig. The evidence further tended to show that when the weight of the valve was taken by the derrick, that side of it which contained the two legs slipped out, away from the ditch, causing the derrick to spread out and come down onto the plaintiff.

The amended count which the plaintiff filed charged that the defendant "did negligently and carelessly insecurely fasten and install the said derrick so that it was dangerous

and wholly insufficient for the uses and purposes for which the plaintiff was required to use it, and so that it was likely to slip and break and fall apart, * * * and by reason of the negligence of the defendant, as aforesaid, * * * the said derrick then and there suddenly slipped, spread, broke and fell apart, so that a portion thereupon fell upon the plaintiff * * *."

In our opinion there was no variance between the allegations in the original declaration and the proof. There were several alleged acts of negligence charged in the declaration, namely, (1) the derrick was defectively constructed, (2) One of the supports of the derrick was weak, rotten, broken and (3) insecurely fastened and (4) the derrick was wholly insufficient for the uses and purposes for which the plaintiff was required to use it. The remaining part of the original declaration which we have quoted above, is not a charge of negligence but is descriptive of what happened as a result of the several charges of negligence. A declaration may be subject to a demurrer, but where the defendant waives such defects as may be reached in that manner and pleads the general issue, there cannot be said to be a variance if the evidence tends to prove any one of the several acts of negligence which may have been set forth in the declaration. The Weber Wagon Co. v. Kehl, 139 Ill. 644; The City of Rock Island v. Quincy, 126 Ill. 408. In the latter case the declaration alleged that the defendant wrongfully and negligently suffered a sidewalk "to be and remain in bad and unsafe repair and condition, and divers of the planks wherewith the said sidewalk was laid, to be and remain broken, loose and unfastened to the stringers thereof * * *." The evidence showed that

the planks were loose and unfastened to the stringers and that this had caused the plaintiff's injuries, but the evidence did not show that any of the planks were broken.

It was held that the failure to prove that the planks were broken did not constitute a variance and it was sufficient to prove that the boards were loose and unfastened and the sidewalk therefore, in an unsafe and dangerous condition.

And so in the case at bar, the evidence shows that the derrick, as it was placed on the occasion in question, "was wholly insufficient for the uses and purposes for which the plaintiff was required to use it," and it also tends to show that the derrick was "defectively constructed". Further, while the evidence does not show that any part of the derrick was "broken" in the ordinary sense of that word, it may well be contended that the derrick may be said to have "broken" in the technical sense of the word, when it sprend out under the strain and collapsed. However, there is no evidence on this subject. Certainly the evidence established that the derrick was "insecurely fastened".

Inasmuch as the evidence tended to establish some of the acts of negligence alleged, the fact that it did not establish others was immaterial, andthe motion to strike out the evidence on the ground of a variance, should have been overruled.

It was also error to overrule the plaintiff's demurrer to the defendant's plea of the statute of limitations, for the amended count did not set forth a new or different cause of action than that which had been alleged in the original

declaration, but merely eliminated those allegations of negligence which were in the original declaration, but which it was considered had not been established by the proof.

For the reasons given, the judgment of the Superior Court is reversed and the cause remanded.

REVERSED AND REMANDED.

declaration, but merely [illegible]
negligence [illegible]
which it was [illegible]
proof.

For the reasons given, [illegible]
Superior Court [illegible]

53 - 23955

212 I.A. 665

WALTER E. VON BRUCH,

Defendant in Error,

vs.

JOSEPH LANUS,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

The plaintiff brought this action in the Municipal Court of Chicago, alleging that he had suffered damages in the sum of $1,000 by reason of fraud and deceit practiced by the defendant in connection with the sale of an automobile. The issues were tried before a jury, resulting in a verdict for the plaintiff, in the sum of $300.00, on which the court entered judgment, and to reverse which the defendant has sued out this writ of error.

In his amended statement of claim the plaintiff alleges that his claim is for damages sustained "by reason of the malicious and wrongful taking and detaining" of a certain automobile, which the plaintiff had purchased from the defendant, giving him in payment therefore, a certificate of deposit of $350.00 which the plaintiff had made on the purchase of another automobile and which the defendant accepted at a value of $250.00 on this transaction, and in addition thereto, fifteen notes, each for the sum of $50.00, which notes matured monthly on and after their date; that these notes were secured by a chattel mortgage on said automobile; that "before the maturity of the first of the

SIA1A.G36

83 - 2306E

WALTER R. VOL [illegible],

Petitioner in [illegible],

vs.

JOHNSON LIU,

Respondent.

[illegible] 1, 1983

court.

The plaintiff [illegible] in this [illegible] Court of Kalawao, alleging [illegible] the sum of $1,000 by [illegible] by the defendant in [illegible] The issues [illegible] for the plaintiff, [illegible] entered judgment, and [illegible] upon our this [illegible] Court.

In [illegible] allegen that [illegible] of the malfeasance [illegible] certain automobile, [illegible] the defendant, [illegible] date of [illegible] the [illegible] suspension [illegible] addition [illegible] entry [illegible] there [illegible] automobile [illegible]

said notes the defendant interfered with the plaintiff's use of the said automobile, and without any reason or cause therefor , refused to permit the plaintiff to take said automobile from said(defendant's) garage, for the purpose of using the said automobile; that upon the maturity of the first of the said notes, the defendant refused a tender of the payment of the said Note," with interest and "demanded the immediate payment of all of the said Notes"; that "the said actions of the defendant * * * were "done for the express purpose and malicious intent of the defendant to defraud and cheat theplaintiff out of the money paid for said automobile; * * *. Wherefore, the plaintiff, by reason of the malicious and wrongful acts of the defendant, and the fraud and deceit practiced by the defendant upon the plaintiff in taking possession of the said automobile, and depriving the plaintiff of the use thereof, the taking of the said certificate of deposit for the sum of $350.00, and the taking of the said automobile, has sustained damages in the sum of $1000.00."

The defendant urges that the trial court erred in excluding certain letters that were offered in evidence, and further, that the evidence failed to establish the plaintiff's case as alleged in his amended statement of claim, and that the judgment should be reversed as being based upon a verdict which is contrary to the manifest weight of the evidence.

The undisputed evidence showed that the plaintiff had purchased from the defendant, the automobile referred to in the statement of claim, on the terms therein set forth as quoted above. The chattel mortgage given to the defendant

said notes the defendant [illegible] liability
was of the main automobile, [illegible] any form of damage
therefor, refused to permit the plaintiff to take said
automobile from the last mentioned place, [illegible] purpose
of using the said automobile; that [illegible] taking of
the first of the car [illegible]
tender of the [illegible]
and "assumed the [illegible]
that "the said action of the [illegible]
for the [illegible] purpose [illegible]
defraud and cheat the plaintiff [illegible] for
said automobile; * * *. Therefore, [illegible], by
reason of the [illegible]
ant, and the fraud and [illegible]
upon the liability in [illegible]
mobile, was depriving [illegible]
the taking of the [illegible]
of $300.00, was the taking of [illegible]
sustained damages in the [illegible]."

The [illegible] the trial court erred
in excluding evidence [illegible]
and further, that [illegible]
liff's [illegible]
that the [illegible]
verdict [illegible]
evidence.

The [illegible]
had [illegible]
in the statement of claim, on the [illegible]
as quoted above. The [illegible] the [illegible]

by the plaintiff provided that "in case default shall be made in the payment of the Note aforesaid, or any part thereof, or the interest thereon, on the day or days respectively on which the same shall become due and payable; or if the Mortgagee * * * shall feel.....his.....insecure or unsafe, or shall fear diminution, removal or waste of said property; or if the Mortgagor shall sell or assign, or attempt to sell or assign," the said automobile; "then, in any or either of the aforesaid cases, all of said Note..... and sum of money, both principal and interest, shall, at the option of the said Mortgagee * * * become at once due and payable, and the said Mortgagee * * * shall thereupon have the right to take immediate possession of said property, * * * and sell and dispose of the said property or any part thereof, at public auction, to the highest bidder * * *." The mortgage and the notes are all dated, Feb. 24, 1915. The first note was due March 24, 1915, and was not paid at maturity.

The plaintiff received the automobile at the time the purchase was consummated and used it for the following month, keeping it in the defendant's garage. Although the evidence on this point is conflicting, in our opinion it clearly establishes that the defendant did not interfere with the plaintiff's use of the automobile, before the maturity of the first note, but that it was on March 25, 1915 when he refused to permit the plaintiff to remove the car from the garage, the defendant giving as his reason for this action, that he had been informed that the plaintiff was endeavoring to sell the automobile, and under those circumstances felt insecure and unsafe. The defendant testified that he then told the plaintiff that if he wanted to

-2-

by the plaintiff [illegible]
in the [illegible]
the informal [illegible]
the [illegible]
shall [illegible]
diminution, [illegible]
[illegible]
said [illegible]
all of [illegible]
interest, [illegible]
[illegible]
shall [illegible]
of [illegible]
party [illegible]
bidder [illegible]
Feb. 24, 1915. [illegible]
[illegible]

The [illegible]
the purchase [illegible]
month, [illegible]
[illegible]
clearly [illegible]
with the [illegible]
[illegible]
1915 [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
find [illegible]

sell the car, he could do so from the garage under the defendant's supervision and that he, the defendant, would help him sell it, but that he could not permit him to take it out again until "he had satisifed the account or had given me some security that the balance would be paid."

The evidence seems to establish further, that on March 26, the plaintiff called at the defendant's garage, with his lawyer, andtendered $50.25 in payment of the first note, which the defendant refused to accept after calling up his lawyer and discussing the situation with him over the telephone, and at the time the defendant refused this tender he told the plaintiff and his lawyer that he had elected to declare the entire amount due under the terms of the chattel mortgage.

Mr. Edgar J. Phillips testified that he had acted as the defendant's lawyer on the occasion in question and that on March 25, he received a call from Mr. John E. Erickson representing the plaintiff, and told him that the defendant had evidence that the plaintiff had been trying to sell the car contrary to the chattel mortgage provision, and for that reason the defendant was inclined to keep the car unless the plaintiff could give him some assurance that if he did sell the car, the defendant would get his money. Mr. Phillips testified further, that for a period of three or four days after this, he conferred with Mr. Erickson a number of times in this matter, and in allof these conversations told him that "we wanted to help Mr. Vom Bruch to get what money he had put in the car, but we did not want to jeopardize our interests by doing so;" that Mr. Erickson told him he was endeavoring

-2-

sell the car, he could do so [illegible] the [illegible] defendants [illegible] he, [illegible], could help him sell it, but [illegible] to take it out again until [illegible] or had given me some security [illegible]."

The evidence [illegible] March 26, the plaintiff called [illegible] with his lawyer, [illegible] first note, which [illegible] calling up his lawyer [illegible] him over the telephone, [illegible] fused this [illegible] the plaintiff [illegible] be her [illegible] terms of the [illegible].

Mr. Edgar [illegible] Williams [illegible] as the defendant's lawyer on the [illegible] that on March 26, Mr [illegible] son representing the [illegible] but he claimed that he [illegible] the car's history in the [illegible] that reason the [illegible] the plaintiff on the [illegible] sell the car, [illegible] testify [illegible] after this, [illegible] on this [illegible] in the car, [illegible] by doing so? [illegible]

to raise some money to take up the whole amount and "so as to co-operate with him, I gave him the insurance policy which Mr. Lanus had been holding, taking his receipt therefor." This evidence is undisputed.

The defendant offered two letters, in evidence, sent to the plaintiff by registered mail and returned, unopened, marked, "Mv'd, Left no Add." which letters were opened for the first time in court, when they were offered in evidence. The first letter was dated March 25, and notified the plaintiff that the first payment called for in the chattel mortgage on the automobile, was past due and unpaid, and that the defendant had decided in accordance with the terms and provisions of the mortgage, to declare the entire indebtedness due and to proceed to sell the car to pay the balance of the indebtedness and to turn over the excess, if any, to the plaintiff. The second letter was dated March 30, and was a formal notice of the time and place of the proposed sale. Both letters were addressed to the plaintiff at "257 North Kostner avenue, Chicago," the only address which the plaintiff had given and the address at which the plaintiff testified he was living at that time. The plaintiff objected to the introduction of these letters on the ground that the statute on the subject of chattel mortgage sales did not provide for a service of this kind of notice, by means of the United States Mail. The court erred in sustaining that objection. This was not a suit in the nature of an action for trespass, nor was it one wherein the plaintiff claimed damages as a result of a conversion or wrongful taking of the automobile, but was one wherein he asked damages which he claimed he had suffered as a result of the defendant's

fraud and deceit. The issue which was to be decided by the jury, was not as to whether the defendant had accomplished a valid and legalforeclosure of his chattel mortgage, but as to whether he had practiced the fraud and deceit upon the plaintiff, which was the basis of the suit which the latter had brought as alleged in his amended statement of claim, and on that issue both the fact that the letters had been sent, and the letters themselves were competent and admissible in evidence.

The evidence further shows that the defendant had been advised of some attempt upon the part of the plaintiff to dispose of the car. It is further established by the evidence, and this without dispute, that the automobile was sold at public auction at the time and place mentioned in the notice which the defendant had endeavored to send to the plaintiff, and that there were some fifteen people at the sale, and ten or twelve bids made, that the car was sold to the highest bidder for $760.00, and under date of April 5, the defendant sent the plaintiff, by registered mail, due notice of the results of the sale, which letter was also returned as the others had been, but a duplicate of it sent by registered mail to the plaintiff in care of his lawyer, had been duly received. It was further in evidence that the defendant did not see the plaintiff from the time he called at the defendant's garage, with his lawyer, on March 25, until he saw him in court at the time this case was tried.

On this evidence we are clearly of the opinion that the charge of fraud and deceit, made by the plaintiff in his statement of claim, was not proven and the court should have

allowed the defendant's motion, made at the close of all the evidence, wherein he requested a peremptory instruction directing the jury to find the defendant not guilty. Fraud will not be presumed but must be proved, by such clear and convincing evidence as leaves the court well satisfied with the allegations made. If the motives and designs of one charged with conduct amounting to fraud and deceit can be attributed to an honest and legitimate motive as well as to a corrupt one, the former should be adopted. McKennan v. Mickelberry, 244 Ill. 117. The evidence contained in this record would seem however, to admit of no doubt and in our opinion it clearly establishes that the defendant was prompted in whatever he did, by no improper motives.

It will not be necessary to pass upon the other errors assigned. For the reasons stated, the judgment of the Municipal Court will be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT:

We find as a fact that the defendant did not practice any fraud and deceit upon the plaintiff, and committed no acts with malicious intent to defraud and cheat the plaintiff, as alleged in the amended statement of claim.

[illegible]

[illegible]

[illegible]

78 - 23990

212 I.A. 665

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

LUDWIC LUDRA,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE THOMSON delivered the opinion of the court.

This is a writ of error to reverse a judgment of the Municipal Court of Chicago, finding the plaintiff in error guilty of petit larceny, on a trial before the court without a jury and sentencing him to five months in the House of Correction, and to pay a fine of $1.00 and costs.

The information alleged that, on Nov. 26, 1917, the plaintiff in error, "did steal, take and carry away, with intent to steal the same, eight dollars ($8.00) in United States currency."

Section 27 of the Municipal Court Act, is in part as follows: "every information shall set forth the offense with reasonable certainty, substantially as required in an indictment." The same certainty of allegation is required as in an indictment, People v. Weinstein, 255 Ill. 530.

It was held in People v. Miller, 178 Ill. App. 292, that an information for larceny alleging that the defendant "did fraudulently take, steal and carry away,

the sum of nine dollars, $9.00, lawful money of the United States of America, of the value of nine dollars," did not set forth the offense with sufficient certainty.

In People v. Hunt, 251 Ill. 446, the defendant was convicted under a count which charged the larceny of a pocket-book of the value of one dollar and "$55 of good and lawful money of the United States of America of the value of $55." While this case was decided on a point which is not presented in the case at bar, the Supreme Court in commenting on the count from which we have quoted said: "A common law indictment for the larceny of money which merely describes the subject of the larceny as a certain number of dollars in lawful money of the government of a stated value would be too indefinite and uncertain, and should according to the great weight of authority, be quashed on motion."

Under the rule as it has thus been laid down, by our courts, we hold that the information involved in the case at bar, was insufficient. It is true, as pointed out by defendant in error, and also by the court in People v. Miller, supra, that this rule construing the charge of larceny very strictly, grew up in an attempt by the courts to modify the harshness and severity of the common law, under which for centuries grand larceny was punishable by death, and in those times the value of moneys often fluctuated materially, and as the court said in the case last referred to, we might have felt at liberty to modify this rule, in its application to the present times, so different from those, which then seemed in justice to demand it, were it not that we feel bound by the holding of the Supreme Court, in People v. Hunt, supra, and their construction of the

allegation complained of in the information there involved.

The defect in this information is not such a one as may be said to have been waived, where the defendant does not ask for a bill of particulars, or move to quash the information, for it is one that goes to the merits of the case, on the question of the guilt or innocence of the accused, and such a defect may be availed of in a writ of error, even though no motion to quash or in arrest of judgment has been made in the trial court, People v. Weiss, 168 Ill. App. 502, 510.

The other error assigned need not be considered. The judgment of the Municipal Court is reversed and the case remanded.

REVERSED AND REMANDED.

298 - 24225

212 I.A. 665

JOHN F. GOLDEN, IMPORTERS AND MANUFACTURERS COMPANY, [illegible] STATE BANK, and BENTLEY MURRAY & COMPANY,
Complainants and Appellees,

vs.

JOHN A. CERVENKA, WILLIAM C. NIBLACK, as Receiver of the LA SALLE STREET TRUST AND SAVINGS BANK, CENTRAL TRUST COMPANY OF ILLINOIS and the STOCKHOLDERS of said LA SALLE STREET TRUST AND SAVINGS BANK,
Defendants and Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In a second amended and supplemental bill the complainants alleged that the LaSalle Street Trust and Savings Bank was organized in the year 1912 for the purpose of doing a general banking business; that it ceased doing business on the 12th day of June, 1914, because of insolvency; that its then assets were not more than 50 per cent of its liabilities and that there would remain due and owing to its creditors after distribution of such assets the sum of $2,000,000; that a receiver appointed by order of court took possession under the direction of the court of all of its property and assets; that a final decree was entered in the suit in which the receiver was appointed, dissolving the bank and ordering that its assets be converted into money and distributed among its creditors.

The bill set out the namesof subscribers to the capital stock and surplus of the LaSalle Street Trust & Savings Bank and the number of shares held by said subscribers and charged that no other subscriptions were made; that none of said subscriptions

were paid by any of the subscribers or any other persons for them; and by further allegations it is charged that the conduct of the La Salle Street Trust & Savings Bank by its officers was such that the complainants and other creditors who might choose to come in and prove their claims were entitled to a decree "that the court might ascertain and declare who were the creditors of the Trust & Savings Bank and the total liabilities of the Trust & Savings Bank to its creditors and that the court might ascertain and declare who were stockholders of the La Salle Street Trust & Savings Bank on June 12, 1914, as well as what other persons had, from time to time prior to said date, been stockholders thereof, and the extent of the liabilities of said present and former stockholders respectively to the creditors of the Trust and Savings Bank under Section 6 of Article XI of the Constitution."

Answers were filed by a number of defendant stockholders, including appellants, and on July 18, 1916, a decree was entered in the cause. By the terms of the decree those stockholders who held shares of stock at the time of the appointment of the receiver, as well as certain stockholders who hadparted with their stock prior to such appointment, were required to pay to the receiver amounts equal to the par value of the shares of stock held by them respectively. The decree further provided that payments under the decree of the amounts required to be paid by stockholders in satisfaction of their liabilities as stockholders was to "operate as a satisfaction of the liability of every other defendant as a holder of such share of stock, without prejudice to any right of any holder of such share of stock, by an appropriate action or proceeding, to compel contribution or reimbursement by any other holder of such share of stock for the amount so paid."

Certain stockholders appealed from this decree to the Supreme court, which held the decree to be erroneous. (Golden

v. Cervenka, 278 Ill. 409.) Upon remandment of the case to the Circuit court a decree was entered appointing the Chicago Title & Trust Company receiver to receive the amounts due from stockholders. The decree also ordered a reference to a master in chancery to ascertain the amounts due the receiver from former stockholders. Before any proceedings were had before the master, and in accordance with the decree, the creditors of the Trust & Savings Bank filed their claims with the receiver and the report of the receiver to the court allowing such claims was duly approved by the court.

The decision of the Supreme court disposes of every question with respect to the liability of the bank's stockholders to the receiver, excepting only with reference to the liability of those stockholders who had parted with their stock before June 12, 1914, the day that the LaSalle Street Trust & Savings Bank suspended. Exhibits prepared by witnesses from the books of the bank were introduced in evidence, which showed among other things the liabilities of the LaSalle Street Trust & Savings Bank to its creditors at the close of business on June 11, 1914; the names of stockholders of the bank at the time of its suspension and also the names of persons who held stock in the bank prior to its suspension with the number of shares and the periods of time during which the latter stock was so held by the former owners thereof. No objection was made to the introduction of these statements by the defendants, who by their appeal bring the case to this court. Such objections as were made to the statements were not specific, and none of them was based on the fact that the original books of the bank were not introduced in evidence.

A statement was also introduced in evidence which showed, among other things, the liabilities of the bank which had accrued while certain stockholders were the owners of stock in the bank during periods of time prior to June 19, 1914. This

v. Barrows, 176 Ill. 4[illegible]. [illegible] Circuit court [illegible] & Trust Company [illegible] holders. The decree also [illegible] chancery to [illegible] stockholders. [illegible] ter, and in [illegible] Trust & Savings [illegible] report of the [illegible] approved by the court.

The decision [illegible] question with [illegible] to the receivr, [illegible] those stockholders [illegible] 1914, the day [illegible] Bankers [illegible] introduced in [illegible] bilities of [illegible] creditors [illegible] of stockholders [illegible] also the [illegible] prior to [illegible] ing which [illegible] or. We [illegible] by the [illegible] such [illegible] and more [illegible] the bank [illegible]

[illegible] above. [illegible] accrued [illegible] the bank during [illegible] of the [illegible]

exhibit was a compilation made from the bank's stock ledger which was offered in evidence and also certain exhibits which have been referred to.

In addition to the foregoing the master received in evidence a certificate of evidence taken on the former hearing; certain orders which had been entered in the cause, and also the receiver's report of claims referred to in one of such orders. Upon the evidence submitted the master reported his findings and conclusions to the court. Exceptions were filed by appellants to the report, which exceptions did not question any ruling of the master with respect to the admission of evidence. The court overruled the exceptions, approved the report of the master and decrees were entered against R. D. Gregg for $1,000; against Curtis J. Judd for $5,000; against T. J. O'Malley for $3,000, and against Frank L. Smith for $15,000, which several sums the parties named were required to pay to the Chicago Title & Trust Company as receiver. The above named defendants by this appeal seek to reverse this decree.

It is contended on behalf of appellants that the master erred in receiving in evidence the evidence which was admitted upon the former hearing of the cause; that the testimony taken at a former hearing before a master was not competent or admissible because, as it is asserted, the master who heard the evidence in the former hearing had before him for determination other issues than that involved in the present hearing. As stated, the former decree which was entered in the cause was reviewed by the Supreme court; that decree directed the final stockholders of the LaSalle Street Trust & Savings Bank to pay an amount equal to the par value of their stock to the receiver of the bank. The Supreme court held this part of the decree erroneous and it directed the appointment of a receiver specially authorized to re-

ceive the sums due under the decree.

The decision of the Supreme court puts an end to the controversies between the parties so far as such controversies were expressly or by necessary implication determined by that court; certain of the questions presented here could have been, even if they were not, presented to the Supreme court, and it is now too late to present them on this appeal.

While the bill presented different causes of action against the defendants thereto the supreme court did not see fit to require the bringing of separate actions by the complainants against the different defendants, but it directed that two branches of the case be referred to separate masters. The present appeal presents only the controversy concerning the liability of stockholders, and it may be conceded that much of the evidence which was admitted at the former hearing was immaterial on the issues presented in this appeal. This cannot be said, however, of all of this evidence, much of which is material here; we are not prepared to say that the admission of the evidence did in fact tend to confuse the issues. Even though it be conceded that much immaterial evidence is contained in the record before us, the decree cannot be disturbed if the record discloses that the master and chancellor had before them sufficient admissible evidence to authorize the decree which was entered in the cause.

Appellants duly filed their objections to the report of the master and these objections were ordered to stand as exceptions to the report. These exceptions question the findings of fact and conclusions of the master; none of them, so far as we are able to determine, question the admissibility of the evidence upon which the master based his findings and conclusions.

There is force in the contention that under the rules of the Circuit court a party dissatisfied with rulings by a

master should present the matter for a ruling by the court before the master has made his report, but however this may be, appellants should have presented on their exceptions to the report the alleged errors of the master for a ruling by the trial court; their failure to do this precludes them from presenting such questions to this court.

A point is made that the court erred in directing the master to consider evidence which was contained in a certificate of evidence of a hearing to which the Auditor of Public Accounts of Illinois and the La Salle Street Trust & Savings Bank and its stockholders were parties. In these proceedings the Auditor of Public Accounts sought the dissolution of the bank, an injunction, a receiver, and a winding up of the bank's business. What has been said with reference to the admission of evidence taken upon a former hearing of this cause may be repeated here. In any event, it does not appear that exceptions were taken to the rulings of the master with reference to this evidence, nor does it appear that the chancellor had any opportunity on exceptions to review the action of the master. As stated, the exceptions to the master's report question only his conclusions based upon the evidence which he admitted in the cause.

In O'Connor v. Mahoney, 159 Ill. 69, the Supreme court said:

> "While there is some analogy between certificates of evidence in chancery and bills of exceptions at law, still they are governed by essentially different rules. Bills of exceptions are prepared merely for the purpose of presenting the proceedings and evidence at the trial for review on appeal or writ of error, and when that object is accomplished they are functus officio. Not so, however, with certificates of evidence in chancery. They become part of the record for all purposes. When the evidence is embodied in such certificate it remains a part of the record for all purposes of the litigation and for the support and preservation of the decree. We think it was proper, therefore, to read the evidence as it appeared in the certificate on file."

7

In the case of Coel v. Gloss, 232 Ill. 142, the Supreme court held that the trial court had no authority to refer a cause to a master to report his conclusions from testimony taken before another master. This case which is relied upon by appellants is not in direct conflict with the case of O'Connor v. Mahoney, supra. The evidence referred to in the O'Connor case was taken in open court and was embodied in a certificate of evidence which was signed by the judge, as is the fact in the instant case. In the Coel v. Gloss case, supra, the court attempted to authorize a master to consider evidence which was heard before another master and upon which no report, decree or certificate of evidence had been based; we think, however, that the whole controversy on these questions is best determined by saying that appellants should have included their objections to the evidence in their exceptions to the master's report, and that their failure to do so precludes them from raising the questions here. The same answer may be made with reference to certain exhibits which it is asserted were improperly admitted in evidence. These exhibits were numbered respectively 45, 72, 73 and 75. Exhibits 45, 72 and 73 were made by an accountant from certain books of account of the bank, and on the face of the exhibits it is apparent that the books were too voluminous to be received in evidence. Appellants were given opportunity to verify the exhibits by an examination of the books which were tendered to them. Exhibit 45 was admitted in evidence upon the original hearing and was embodied in the certificate of evidence, a part of the record made therein. The purpose of this exhibit was to fix the dates of the bank's liabilities for the purpose of determining what of these liabilities each stockholder became liable for under the decision of the Supreme court. Some of the evidence contained in these exhibits does not seem to be material to the issues presented in the instant case, but they

were in other particulars material to these issues. Appellants did not ask for the production in open court of the books from which these exhibits were taken. Exhibit 76 appears to have been made by an accountant from other exhibits. This fact, however, does not exclude the exhibit as it appears that it was a mere compilation made by the accountant from the other exhibits. It is not asserted that the compilation was inaccurate.

The law did not impose upon complainants the burden of showing that the books of the bank from which the exhibits referred to were taken were accurate. As against the bank the books would be admissible without proof of their accuracy. In Shalucky v. Field, 124 Ill. 617, the Supreme court held that -

> "It is true that the entries in a pass book are made by an officer of the bank, and not by the stockholder, but such officer, in making the entries, acts as the agent and representative not only of the corporate entity known as the bank, but of the stockholders regarded as unincorporated partners. The written evidence of indebtedness is as binding upon the latter as upon the former."

The decision of the Supreme court on the original hearing rendered it necessary to take proofs of the periods of time during which former stockholders of the LaSalle Street Trust & Savings Bank held their stock therein and also the liabilities of the bank which accrued during those times. In order to make this proof "it became necessary to examine the deposit accounts of each depositor, ascertain the balance due him at the time the bank suspended, and determine the dates on which the liabilities of the bank for the amount represented by such final balance accrued. This was done by beginning with the depositor's last deposit and adding thereto enough prior deposits to make up the amount of the final deposit balance." It is asserted that this method of ascertaining the liabilities of appellants was erroneous. We know of no other fairer way of fixing such liabilities, nor have counsel convinced us that

there is anything inherently unfair in the method adopted. We are inclined to follow the opinion in Clayton's case, (1816) 1, Meriv. (Eng.) 572; 15 Rev. Rep. 161; 3 Eng. Rul. Cas. 329; 35 Eng. Rep. Full Reprint, 781). In deciding that case the court said:

> "This is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the 500 pounds paid in on Monday, and this other to the account of the 500 pounds paid in on Tuesday. There is a fund of 1,000 pounds to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged, or reduced, by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts."

The question of indebtedness under consideration here arises first between the bank and its depositors and the stockholder is to be regarded as standing in the place of the bank; while the rule in Clayton's case, supra, was applied in a suit involving trust moneys deposited in a bank and had reference to the liability of the depositor and against funds deposited in his name, it is essentially well adapted for use in other classes of cases. In a note to Macy v. Rodenveck, L. R. A., 1916, 12, the question under consideration here is discussed on page 82 and while the cases referred to in the note seem in the main to deal with the order of liability imposed upon trust funds, no better rule has been suggested for application in the present case. Complainants were not required before bringing the suit against the stockholders to await the final settlement of the suspended bank's affairs, nor were they required to postpone their action until the assets of the bank were distributed. The liability of a stockholder of a bank under Section 6 of Article 11 of the Con-

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stitution is direct.

In Queenan v. Palmer, 117 Ill. 619, the court in construing the provisions of a bank charter which provided that stockholders in the bank were to be liable to depositors and others in an amount equal to the amount of stock held by them, held that a depositor might proceed against either the stockholder on his charter liability or against the bank. Zang v. Wyant, 25 Colo. 551; Foster v. Broas, 120 Mich. 1.

Appellants are not entitled in this proceeding to contribution from other stockholders; they have not satisfied their obligations to complainants, nor do they admit any liability to them; they have not sought, by cross-bill or otherwise, a decree against other stockholders and the law does not impose upon complainants the burden of requiring adjustment between the stockholders of their several obligations to the bank's depositors. The constitutional provision imposes a primary obligation on the stockholders to the creditors. The stockholders' liability is precisely the same as that of the bank. This liability is contractual and the stockholder by his receipt of the stock impliedly agrees to discharge the obligations of the bank in accordance with the liability which the constitution imposes upon him. Diversey v. Smith, 103 Ill. 373; Shalucky v. Field, 124 Ill. 617; Dupee v. Swigert, 127 Ill. 494.

It is asserted that the trial court erred in entering an order in the cause in November, 1917, from which it appears that certain former stockholders were excluded from the order of reference for the reason that the liabilities of such stockholders to the creditors had been adjudicated or otherwise disposed of. We have no means of knowing whether the entry of this order was erroneous. The order does not expressly release the named stockholders from liability to the creditors, or from a legal demand for contribution; it seems to recognize some sort of former adjudication or disposition of the claims against the excluded stockholders.

stitution is intact.

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Foster v. Brown, 110 Mich. 1.
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or disposition [illegible]

The evidence tends to show that the assets of the bank were insufficient to meet its liabilities and the Supreme court held that "the deficiency in the assets of the bank for the payment of its creditors was greater than all of its capital, surplus and undivided profits." We think the master's report is supported by the evidence, which is so voluminous that it would be impracticable to discuss it in this opinion.

The decree of the Circuit Court will be affirmed.

AFFIRMED.

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supported by the evidence, which is so voluminous that it could
be impracticable to discuss it in this opinion.

The decree of the circuit court will be affirmed.

AFFIRMED.

347 - 24274

212 I.A. 666

OSCAR H. SIPPEL,
Appellee,

vs.

CHICAGO CITY RAILWAY CO.,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE DEVER
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior court in favor of the plaintiff for the sum of $2,500. In an amended declaration it was charged that the plaintiff was injured by reason of the negligence of the defendant in operating a street car out from premises occupied by defendant across the sidewalk upon which plaintiff was traveling.

The evidence introduced upon the trial shows that the defendant used the property in question as a "pocket" for the storage and movement of street cars which were run in and out of the premises over tracks extending therefrom and connecting with tracks in Wentworth avenue; these tracks extend across an 8 foot sidewalk on the west side of Wentworth avenue. From the outer edge of the sidewalk the tracks curve north to the tracks in Wentworth avenue. On October 8, 1913, a street car 48 feet, 2 inches in length and 9 feet in width, swung out of the "pocket" upon the outbound track onto Wentworth avenue across the sidewalk in question. At this time plaintiff and a Mr. Amlong were walking north on the sidewalk. As they approached the south rail of the outbound track the plaintiff caught hold of Amlong, saying, "Jump, there is a car coming." The testimony of Amlong and plaintiff tends to show that they both attempted to step back from the track to avoid being struck by the rear end of the car as it turned on the curve to go north; that be-

347 - 86474

GEORGE H. [illegible],

Appellee,

vs.

CHICAGO [illegible] RAILROAD CO.,

Appellant.

[illegible]

[illegible]

[illegible]

fore they had time to reach a place of safety Amlong was struck by the rear end of the car and was thrown against the plaintiff, who fell across a pile of brick and other rubbish at the edge of the sidewalk. The evidence introduced on behalf of plaintiff tends to show that he sustained a sprained thumb, bruises to his shoulder, and a back injury which he insists is permanent in its nature.

It is insisted on behalf of defendant that the evidence introduced on the trial does not disclose that the defendant was guilty of the negligence charged in plaintiff's declaration, and further that plaintiff was guilty of contributory negligence at and just before the time of the accident. It is our opinion that these questions were properly submitted to the jury by the trial court and that the verdict of the jury and judgment of the trial court should not be disturbed for these reasons. The record before us discloses, however, that the court erred in its rulings with reference to the admissibility of certain evidence.

The plaintiff placed upon the witness stand Albert L. Joergens, an X-ray expert, for the purpose of identifying an X-ray plate which purported to show the lumbar region of plaintiff's spine. In testifying Joergens stated, over the objection of defendant's counsel, that the X-ray plate showed, "To my belief, a necrotic condition, necrosis, with is a tubercular condition of the bone, in a way. It is fundamentally tubercular, the necrosis is." This evidence was permitted by the court to remain in the record on the promise of plaintiff's counsel to connect it with medical testimony. Later in the trial Dr. Reynolds for plaintiff testified that he had examined plaintiff several times, and he was asked, over the objection of counsel for defendant, "What may cause necrosis of the bone?" and he answered, "Why, some injury to the

periosteum might do that." The court then inquired, "What causes a tubercular condition of the bone?" and the witness answered: "You may have an injury to the periosteum or interference with the circulation, in that case." The testimony of Joergens quoted above was later stricken from the record because of the failure of plaintiff to connect it with medical testimony.

We think that this testimony should not have been admitted at all. The witness did not qualify as a medical expert; he was placed upon the witness stand solely for the purpose of reading or interpreting the X-ray plate and his testimony as to the necrotic condition, which he said was evidenced by the plate and that this condition was fundamentally tubercular in character, was inadmissible even though it was accompanied by a promise to connect it with medical testimony. When the doctor was placed upon the witness stand he failed, however, to make any such connection. Had it appeared by medical testimony or otherwise that the plaintiff in fact suffered from the condition which Joergens attempted to describe, the incompetency of his testimony might not authorize a reversal of the judgment, but standing, as it does, wholly unsupported and it being evident that the plaintiff's counsel knew, or could have known, that plaintiff would be unable to make the promised connection, the evidence should not have been heard. Chicago Union Traction Co. v. Ertrachter, 130 Ill. App. 607. It is quite evident that it was possible to ascertain by the aid of medical experts the condition of plaintiff's spine before the trial. The discussion before the jury of the meaning of the language used by Joergens in his testimony, both by him, Dr. Reynolds and the court, must have impressed the jury with the fact that the injuries sustained by plaintiff were much more serious than those shown by the evidence. The verdict of the jury was for the sum of $4,500; this was reduced by the trial

judge to $2,500, and there is much force in the contention that even this latter sum is too high in view of the injuries which the evidence tends to show plaintiff received.

> "We are unable to say that the jury's estimate of the damages suffered by the plaintiff may have not been affected by the improper testimony admitted and afterwards stricken out, and this, in our opinion, is sufficient to require from us a reversal of the judgment."

Chicago City Ry. Co. v. Rublee, 136 Ill. App. 233.

In C. U. T. Co. v. Arnold, 131 Ill. App. 599, it was said, p. 602:

> "There is nothing in this record, aside from the unfounded testimony of Dr. McGregor, pointing to the womb trouble of appellee as in any manner attributable to the accident charged in the declaration. That such testimony, though stricken out, impressed itself upon the minds of the jury and was heeded by them in assessing damages, we cannot doubt, in view of the large and confessedly excessive verdict. Striking out this evidence did not cure the mischief its introduction had wrought. On such a vital matter the ruling of the court should have been in consonance with the law. Tumalty v. Barker, 100 Ill. App. 382; Norris v. Warner, 59 Ill. App. 300; Hanewacker v. Ferman, 152 Ill. 321; Fairbanks v. Nicolai, 167 Ill. 242."

The attention of the jury was called, by the testimony of Joergens, to a condition which if present would have indicated that the plaintiff's injuries were of a most serious character. It is apparent that if plaintiff, in fact, had sustained any such grave injuries as a consequence of the accident it would have been proper to have shown the fact by medical testimony; but, plaintiff failing or being unable to offer such evidence, the subject should not have been called to the attention of the jury at all. Kimbrough v. Chicago City Railway Company, 272 Ill. 78.

On the trial the defendant offered to prove that it had adopted a system by which its employes in charge of the operation of cars were required to make reports of accidents, and that there was no report made by any of the employes of any accident occurring at the time and place when and where the accident in question occurred. This evidence was tendered for the purpose

of excusing the failure on the part of defendant to call witnesses to the occurrence. The court sustained an objection to this evidence and defendant duly excepted to the ruling. We think this evidence was admissible. While it is true that certain witnesses, conductors and motormen, testified that they operated over the tracks in question on the day of the accident, and that they had no knowledge of any accident occurring on that day, counsel for plaintiff by his cross-examination of these witnesses intimated that other cars did operate in and out of the "pocket" on the day in question. Defendant should have been permitted to show by the records, kept in accordance with an adopted system of the defendant, that no report had been made of the accident in question. The failure on the part of defendant to introduce evidence as to the occurrence might well be urged in support of the claim that the defendant's employes were at fault in the manner in which the car which caused the accident was driven. Hope v. West Chicago Street Ry. Co., 82 Ill. App. 317. "The mere withholding or failing to produce evidence, which, under the circumstances, would be expected to be produced, and which is available, gives rise to a presumption against the party." Jones on Law of Evidence, Sec. 17, page 37. Taken together the errors complained of and the excessive amount of the verdict convince us that the case should be retried.

The judgment of the Superior court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

551 - 23896

212 I.A. 666

JOHN A. ABEL and EDWARD C. ABEL, copartners trading as ABEL BROS. & CO.,
Appellees,

vs.

GEORGE M. POE trading as GEORGE M. POE & CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This cause is here for the second time. The facts and the law of the case are sufficiently stated in Abel v. Poe, 199 Ill. App. 391, to which case we refer without repeating. The judgment reversed was one of nil capiat; the judgment now before us is one against defendant and in favor of plaintiffs for the sum of $671. In case, supra, the law of the case was settled and we find no facts in the record before us which call for any disturbance of the legal conclusions there reached. In our former decision we held that the six diamonds here and there in controversy were consigned on memorandum and that the title thereto remained in plaintiffs and that defendant when he received the same in pawn gained no title thereto as against the plaintiffs. Four additional witnesses were produced by defendant on the second trial and eleven letters, all written subsequent to the contract between plaintiffs and the Globe Importing Company. Neither the letters nor the testimony of the additional witnesses in any manner even tended to affect the contract as theretofore made. Some of these letters referred to diamonds other than the six here in dispute. None of these letters was of any probative value as a defense to the action. Certain bankruptcy proceedings were offered as new evidence to support a contention that the diamonds in question were not consigned on memorandum to the Globe Importing

Company, but were unconditional sales for which the notes of the Importing Company had been given and received. This contention finds, however, no support in the proofs, but on the contrary refers and relates to other dealings between plaintiffs and the Importing Company.

While on the former hearing of this case we held that the counter claim for services under an alleged agreement with Pinkerton could not be set off or recouped in a tort action, counsel challenges the correctness of this holding and cite Stow v. Yarwood, 14 Ill. 424, as an authority that a claim originating in contract can be set up against one founded in tort. Without questioning the accurateness of this contention as matter of law we feel the Stow case is clearly inapplicable to the facts before us, because the counter claim does not arise out of the contract in suit. Our decision relates to the contract between plaintiffs and the Globe Importing Company, under which the diamonds in question were consigned to the Importing Company under a memorandum agreement by which the title to the diamonds remained in plaintiffs and did not pass to the Importing Company; so that defendant when he received these diamonds in pawn obtained no title thereto. The counter claim rests upon an alleged contract between Pinkerton and defendant for the recovery of jewelry other than the diamonds here involved. This is another and distinct contract between different parties, notwithstanding the contention that Pinkerton was acting as the agent of plaintiffs. The rule to be applied to the condition here presented is that a claim for unliquidated damages arising out of a breach of contract cannot be set off in an action to recover on another contract, and damage claimed growing out of a former contract cannot be recovered by recoupment. Sleepy Eye Milling Co. v. Hartman, 184 Ill. App. 308.

It is also the law that unliquidated damages arising out of a contract unconnected with the subject matter of a plain-

tiff's suit cannot be made the subject of set off in that suit. Clause v. Bullock Printing Press Co., 118 Ill. 612. So also is it an indispensable element in the doctrine of recoupment that the demand in suit and the demand sought to be recouped must arise out of and be connected with the same subject matter. Keegan v. Kinnare, 123 ibid 280.

The instructions of the court to the jury were, in the condition of the record, without error, as it was the duty of the court to instruct a verdict for plaintiffs, as it did.

The judgment of the Municipal court is, for the foregoing reasons, affirmed.

AFFIRMED.

301 - 24228

MICHAEL GORMAN, Administrator of the Estate of Margaret Gorman, deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

212 I.A. 666

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of $5,000 entered against it on the verdict of a jury in an action on the case for negligently causing the death of plaintiff's intestate.

As there must be a new trial of this case for errors of the trial court in its rulings upon evidence and in instructions to the jury, we shall refrain from either discussing or passing judgment upon the probative force of the evidence where it is in conflict.

Defendant urges for reversal, error in the court's holding as valid the so-called Park Ordinance, the giving of erroneous instructions, the negligence of Margaret Gorman, and that the one year limitation in the "Death Act" was a bar.

We will not at this time pass upon the question of the claimed negligence of deceased, as the jury may (as it has already inferrentially done) find upon a new trial that the deceased was without negligence.

To the declaration as originally filed there were added four additional counts. The declaration and the first additional count were amended at a time more than one year subsequent to the death of Margaret Gorman. We are unable to discern that any new cause of action was injected into the case by the amendments to either the declaration or the first additional count thereof.

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We think this case on this point comes within the reasoning of Chicago City Ry. Co. v. McMeen, 206 Ill. 108, in which it was held that an amendment to a declaration, restating in different form the same cause of action set up in the original declaration, relates back to the time of the commencement of the suit and the running of the statute is therefore referable to that time and not to the time of filing such amendment.

Margaret Gorman was injured by being struck by a southbound car of defendant while she was walking west across Cicero avenue at its intersection with Jackson street. Plaintiff claimed that Jackson street was a boulevard under the jurisdiction of the West Chicago Park Commissioners and offered in evidence an ordinance of the commission requiring the stopping of street cars before reaching a boulevard or street under its control. This ordinance was received in evidence, and it is contended that the court's ruling in this regard was erroneous because of failure to prove that the necessary preliminary steps were taken to bring the intersection under the control and jurisdiction of the Park Commissioners. It is likewise insisted that the ordinance was invalid because it was not proven that the second condition of the city ordinance, which provided that an acceptance of the same by the Park Commissioners should be filed with the city clerk within ninety days, was complied with. The city ordinance granting to the Park Commissioners that part of Jackson street the scene of the accident for boulevard purposes was in evidence, as well as an ordinance of the Park Commissioners accepting the city ordinance, although it is quite true that there was no proof that such accepting ordinance had been filed with the city clerk within the time limited by the city ordinance nor any proof that the other preliminary steps had been taken.

We think this case is in point some within the reasoning of Chicago City Ry. Co. v. Keegan, 203 Ill. 214, in which it was held that an ordinance to a municipal corporation, restricting in different form the same amount of notice set up in the original declaration, relates back to the time of the commencement of the suit and the running of the statute of limitations ceases at that time and not to the time of filing such amendment.

Margaret Norman was injured by being struck by a southbound car of defendant while she was walking west across Ogden avenue at its intersection with Lawndale street. Plaintiff claimed that Lawndale street was a boulevard under the jurisdiction of the West Chicago Park Commissioners and offered in evidence an ordinance of the commission requiring the stopping of street cars before reaching a boulevard or street under its control. This ordinance was received in evidence, and it contended that the court's ruling, in this regard was erroneous because of failure to prove that the necessary resolution were duly taken to bring the intersection under the control and jurisdiction of the Park Commissioners. It is likewise insisted that the ordinance was invalid because it was not proven to be the second edition of the city ordinance, which provided that a copy of the same by the Park Commissioners should be filed with the city clerk within ninety days, was complied with. The city ordinance granting to the Park Commissioners [illegible] Ogden street the power of the [illegible] in evidence, as well as [illegible] were accepting the [illegible] was no proof that such a [illegible] the city clerk within the time limited [illegible] proof that the other prerequisites [illegible].

Ordinances of the character of the one in dispute, being in aid of governmental functions. will be liberally construed. C. & N. W. Ry. Co. v. W. Chicago Park Com., 151 Ill. 205.

The ordinances both of the City and the Park Commissioners were valid upon their faces and apparently regular. While it does not affirmatively appear that the accepting ordinance was filed with the city clerk or any of the preliminary steps proven to have been taken, still it will be assumed, in the absence of proof to the contrary, that the city and park officials did their duty. It will likewise be assumed that the Clerk of the Park Commissioners having been ordered to file the accepting ordinance with the City Clerk did so without affirmative proof of that fact. However, even had it been proven that the clerk of the Park Commissioners did not do so, such failure would not of itself invalidate the ordinance. It is again urged that the park ordinance is invalid because it is unreasonable, and the fact that at the time of the accident the street was a "mud street" and had not been boulevarded is sufficient to condemn it as unreasonable. The paving or lack of paving did not affect the validity of the ordinance. An ordinance passed in accord with legislative authority is presumed to be valid and will not be held to be unreasonable unless it clearly appears from the proofs that the discretion reposed in the municipal authorities has been overstepped by arbitrary action. C. R. I. & P. Ry. Co. v. Steckman, 224 Ill. 500; C. & A. Ry. Co. v. Carlinville, 200 ibid 314.

Both the city and park ordinances were properly admitted as evidence. Evidence proffered by plaintiff that the so-called boulevard was at a time subsequent to the accident improved by the Park Commission, excluded by the court on the objection of defendant, should have been received as evidence tending to show not only that the Park Commission had accepted

the ordinance and taken control of the street, but that the City had also acquiesced in the acceptance of the ordinance by the Park Commission. Such evidence if again proffered at the next trial must be received.

Defendant seeks to avoid the park ordinance upon the ground that it operates upon territory not within the jurisdiction of the park commission, in that it provides that cars shall stop before reaching the park boulevard. It is patent from the ordinance that the Park Commission claimed jurisdiction of the territory to which the regulation applied. This authority cannot be attacked collaterally. In C. C. & St. L. Ry. Co. v. Dunn, 63 Ill. App. 531, the court said, quoting from an Iowa decision on page 533:

> "Whatever territory the city maintains jurisdiction over must be regarded, we think, de facto corporate territory. If the right of jurisdiction is to be tested it should be done by a proceeding that would be binding upon all and final."

C. & N. W. Ry. Co. v. W. Chicago Park Commissioners, supra.

Error is assigned and argued on the giving of instructions 4, 5, 6 and 7. Instruction 5 was bad because it told the jury that the violation of the park ordinance was negligence per se, when as a matter of law it is but prima facie proof of negligence and rebuttable. However, the instruction was not erroneous in assuming in the state of the proof that Jackson street at the intersection where the accident occurred was a boulevard. In Coulter v. I. C. R. R. Co., 264 Ill. 414, it was held that a street car conductor's violation of an ordinance, as well as a rule of the company, did not constitute negligence as a matter of law, but was evidence which should go to the jury for them to pass upon, as to whether or not such violation of the ordinance and rules was, in all the environing circumstances, actionable negligence. In an opinion not yet reported in case general number 21982, Devine, by next friend v. Chicago

Railways Company, Mr. Presiding Justice McSurely said:

"We are of the opinion that it was error to instruct the jury that a violation of the ordinance as a matter of law is negligence per se. We are aware that the decisions are not wholly harmonious on this point, but this court is convinced that the better reasoning and greater weight of authority support the view that the violation of an ordinance is prima facie evidence of negligence from which the jury may infer negligence, but such inference may be rebutted by evidence. * * * * The jury should be permitted in determining negligence to consider all the circumstances of the occurrence, including the violation of the ordinance. Among the cases supporting this view are, Knupfle, Admr. v. Knickerbocker Ice Co., 84 N. Y. 488; Hanlon v. South Boston Horse Ry. Co., 129 Mass. 310; Connor v. Electric Traction Co., 173 Pa. 602; Meek v. Pennsylvania Co., 38 Ohio St. 632; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408; Erie Railroad Co. v. Farrell, 147 Fed. 220; Beck v. Portland & V. R. Co., 25 Ore. 32; Mollica v. Mich. Cent. R. Co., 170 Mich.96; Illinois Central R. Co. v. Eicher, 202 Ill. 556; Illinois Central R. Co. v. Ashline, 171 Ill. 313; Commonwealth Electric Co. v. Rose, 214 Ill. 545; United States Brewing Co. v. Stoltenberg, 211 Ill. 531; True & True Co. v. Woda, 201 Ill. 315; Meidenreich v. Bremner, 260 Ill. 439; 3 Elliott on Railroads, 2nd ed., Sec. 1095, note 140."

Instructions 6, 7 and 4 are erroneous and on a new trial should be eliminated.

Instruction 7 assumes that a given act was negligence and that the failure to do or not to do a certain thing was negligence, and that as a matter of law it was the duty of the motorman to sound the gong. It was for the jury to say from all the evidence whether the failure to sound the gong was negligence, and telling the jury that it was the duty of the defendant's servant to sound the gong invaded the province of the jury in this regard. C. C. Ry. Co. v. Dinsmore, 162 Ill. 658; I. C. R. R. Co. v. Johnson, 221 Ill. 42.

Instruction 4 told the jury that it was the duty of the motorman to stop the car and prevent the collision, etc., and that a failure so to do was negligence. The determination of the question whether the motorman acted negligently was for the jury. Pienta v. Chicago City Ry. Co., 284 Ill. 246.

Instruction 6 is subject to the same criticism as instruction 4, and is, moreover, bad in declaring "the law is for the plaintiff and you should so find." It is not within the province of the jury, but of the court, to find the law of the case. The jury finds the facts under the instructions of the court as to what the law is and applies such law in finding the facts.

For the errors indicated the judgment of the Superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Instruction 6 is subject to the same criticism as instruction 4, with the, moreover, that it does state "the law is for the plaintiff" and you should so find." It is not within the province of the jury, but of the court, to find the law of the case. The jury finds the facts under the instructions of the court as to what the law is and applies such law to the facts.

For the errors indicated the judgment of the superior court is reversed and the cause is remanded.

REVERSED AND REMANDED.

310 - 24237

212 I.A. 666

ENGLEWOOD HOSPITAL, a corporation,
Appellee,

vs.

HENRY H. MATHER,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

The plaintiff is, as its name implies, a hospital for the treatment of the sick and the injured. The defendant is a medical practitioner at Chicago, who at the time of the occurrences in dispute owned an automobile. This automobile on January 4, 1916, the defendant, on the public highway in the vicinity of Ninety-second street and Cottage Grove avenue, drove against one Mary Hickey, breaking her leg. He thereupon took Mary Hickey to the hospital of plaintiff for care and treatment and left her there. Defendant the next day after leaving Mary Hickey at the hospital was told by the bookkeeper and cashier of plaintiff that when a patient was brought in there must be an understanding as to who was to pay the bill, whereupon defendant replied, "I will."

The evidence strongly tends to sustain this contention of plaintiff, and under the circumstances the promise to pay was an original undertaking and not obnoxious to the statute of frauds, as defendant contends, because the promise was not to pay the debt of another. The debt contracted was the debt of defendant, who had broken Mary Hickey's leg by running against her with his automobile. An examination of the proofs convinces us that the jury might reasonably find not only that defendant was liable but that the amount of the verdict was fully warranted by the

proofs. The court having rendered judgment upon the verdict, we see no reason for disturbing that judgment. Two juries have passed upon the facts and both arrived at the same conclusion and gave verdicts for a like amount.

Defendant complains that the case was wrongfully upon the short cause calendar, claiming that when the case was first tried and a new trial awarded it lost its place upon that calendar and could not be restored thereto except by giving anew the statutory notice. However this may be, defendant had a fair trial, put in every defense he had and was represented by capable counsel. All his rights were protected, and we are not prepared to say that it was not within the sound discretion of the court to proceed to try the case and to still regard it as upon the short cause calendar. Defendant certainly was deprived of no legal right by so trying the case. The only point to be gained by giving a new notice was delay, which the law does not favor. Furthermore, we think in the award of a new trial the case was neither passed nor continued, but was restored to the same position as if there had been no trial. Again defendant insists that the order of May 25, 1917, denying his motion for leave to file an amended affidavit of merits was erroneous. If we should so concede, it was a sufficient curative to permit such an affidavit to be filed September 28, 1917.

Defendant attempted to recoup damages claimed to have been suffered by Mary Hickey for alleged unskillful treatment of her leg by surgeons at the hospital. Defendant in an affidavit set forth that Mary Hickey had brought suit for $50,000 damages against the Englewood Hospital and two doctors.

From defendant's own statement it is manifest that he has no interest in any damage which Mary Hickey may recover, against either the hospital, its surgeons, or all three of them; consequently the court properly ruled against defendant in this

AS. S. McINERNEY
CLERK
OHN E. CONERTY
DEPUTY CLERK

CLERK'S OFFICE
APPELLATE COURT FIRST DISTRICT
STATE OF ILLINOIS
1400 MICHIGAN BOULEVARD BUILDING
CHICAGO December 20, 1918.

Messrs. Callaghan & Company,
401 E. Ohio Street,
Chicago.

Dear Sirs:

In case No. 24237, opinion filed Nov. 11, 1918, the last page of the opinion has been changed by Judge Holdom according to the one enclosed, which please substitute for the one you have.

Yours truly,

Clerk.

jury or any other error which calls for reversal; therefore the judgment of the Municipal court is affirmed.

AFFIRMED.

regard. Mary Hickey is not a party to the instant suit and therefore her claim, whatever it may be, is not a subject for adjudication in this suit indirectly through defendant. Tully v. Excelsior Iron Works, 115 Ill. 544; Graham v. Middleby, 213 Mass. 437.

The rule applicable in cases of recoupment is that no one can set up a claim of recoupment by way of defense unless he could have enforced the alleged liability by direct action thereon.

We discover no error in the instructions to the jury or any other error which calls for reversal; therefore the judgment of the Municipal court is affirmed.

AFFIRMED.

regard. Mary Hickey is not a party to the instant suit and therefore her claim, whatever it may be, is not a subject for adjudication in this suit indirectly through defendant. Tully v. Excelsior Iron Works, 115 Ill. 544; Graham v. Middleby, 213 Mass. 437.

The rule applicable in cases of recoupment is that no one can set up a claim of recoupment by way of defense unless he could have enforced the alleged liability by direct action thereon.

We discover no error in the instructions to the jury or any other error which calls for reversal; therefore the judgment of the Municipal court is affirmed. The additional abstract will be taxed as costs in the cause.

AFFIRMED.

[illegible] Duty. Liability is not [illegible] the instant suit and therefore her claim, whatever it may be, is not a subject for adjudication in this suit involving different defendant. Duty v. Manhattan Iron Works, 110 N.Y. 344; Jackson v. Lighthouse, 13 Misc. 427.

The rule applicable in a case of the character of this suit no one can set up a claim for recovery [illegible] liability unless he could have enforced the alleged liability of [illegible] against thereon.

We discover no error in the instructions to the jury or any other error which calls for reversal. Therefore the judgment of the municipal court is affirmed. [illegible] judgment will be taxed as [illegible] in the court.

377 - 24304

212 I.A. 667

EDWARD G. LINDHOLM,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY and CHICAGO RAILWAYS COMPANY,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HOLDOM DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of $175 in an action for personal injuries.

The case is extremely simple upon the facts; there is but one question of law involved, and that is whether it can be said as a matter of law that the evidence proves that the accident is not attributable to the negligence charged against defendants, but to the want of due care on the part of plaintiff at the time of the collision of the truck he was driving with the car of defendants.

Plaintiff was at the time of the accident driving a big two horse truck wagon south on Desplaines street, which truck came into collision with defendants' car at the intersection of Harrison and Desplaines streets. Defendants' car was westbound as it approached Harrison street, where it was stopped to turn a switch by which the car might be started around a curve so that it might continue its further progress on Desplaines street. Plaintiff saw the car when it was about fifty feet away. At the time the car took the switch and proceeded, as it did, slowly around the curve to the north, the colliding truck and plaintiff were in a place of safety on the west or southbound car track, so that the front of the car safely passed the truck.

It is, however, clear from the evidence that plaintiff, without due care and circumspection, while the car was proceeding very slowly around the curve to the north, turned the horses drawing the truck toward the eastbound car track and came into collision with the rear end of the car, causing plaintiff to be thrown from his seat to the ground and injuring him.

The proof, with but slight contradiction on the part of plaintiff, demonstrates that he was careless in his driving of the team, that the reins were loosely hung from the top of the shade over the driver's seat, and from plaintiff's own testimony it is at least doubtful whether he had any hold of the reins. It was testified by a witness for defendants that plaintiff was, when making the turn to the east, engaged in rolling a cigaret, and while plaintiff denied this, still he admitted that he had tobacco and cigaret paper on the seat beside him.

We can find no reason why, if plaintiff was exercising ordinary care while in a place of safety, he should so manage his horses that the truck they were pulling should come into collision with the rear end of the car. Plaintiff first contended, in order to account for the collision being the result of defendants' negligence, that the truck was struck by the front end of the car, but the testimony is conclusive that plaintiff was in error when he so testified. The motorman and two disinterested witnesses testified that the truck came into collision with the rear part of the car.

The verdict and judgment are against the preponderance of the evidence. The accident was the result of plaintiff's lack of due care and was caused by his own negligence.

The judgment of the Municipal Court is reversed with findings of fact.

REVERSED WITH FINDINGS OF FACT.

it is, however, clear from the evidence that plaintiff, without
due care and circumspection, while his car was proceeding very
slowly around the curve in the road, failed to observe the oncoming
the track towards the approaching car. [illegible] collision
with the rear end of the car, causing [illegible] injuries
from his seat to the ground and injuring him.

The proof [illegible] out clearly contradicts on the part
of plaintiff, as contrasted with the defendant in his driving of
the team, that the reins were loosely held from the top of the
shade over the driver's seat, and from plaintiff's own testimony
it is at least doubtful whether [illegible] at the time.
was testified by a witness for defendant [illegible]
when making the turn [illegible] and while [illegible]
tobacco [illegible] to the road [illegible].

[illegible]
ing ordinary [illegible] while
his horses [illegible]
[illegible]
in order to [illegible]
[illegible]
of the car, [illegible]
error [illegible]
witnesses [illegible]
rear [illegible] of the car.

[illegible]
of the defendant. [illegible]
of [illegible]
[illegible]
[illegible] of fact.

FINDINGS OF FACT.

The court finds as ultimate facts that defendants were not guilty of the negligence charged against them in plaintiff's statement of claim and that the accident to plaintiff was brought about by his negligent conduct.

FINDINGS OF FACT.

The court finds as ultimate facts that defendants were not guilty of the negligence charged against them in plaintiff's statement of claim and that the accident to plaintiff was brought about by his negligent conduct.

190 - 24112

JAMES F. BISHOP, Administrator of the Estate of JAMES J. MORRISSEY, deceased,
Appellee,

vs.

CHICAGO JUNCTION RAILWAY COMPANY, a corporation,
Appellant.

212 I.A. 667

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $15,000 against the defendant in a suit for damages for the death, through accident, of James J. Morrissey while employed by defendant. The Michigan Central Railroad Company was originally co-defendant but on plaintiff's motion was subsequently dismissed.

On June 27, 1914, the accident occurred; plaintiff alleged it was while defendant and Morrissey were engaged in interstate commerce, hence the Federal Employers' Liability Act is applicable. Was this allegation proven? We hold that it was. Plaintiff introduced the record of proceedings before the Industrial Board upon the claim of deceased's widow for herself and child under the Workmen's Compensation Act. By this it was shown that the Chicago Junction Railway Company, the instant defendant, had there asserted the interstate quality of the occurrence and had obtained adjudication to this effect from the Industrial Board, which ordered claimant's petition dismissed on the ground "that at the time said accident occurred the parties were engaged in interstate commerce." (1) Under the authority of Jackson, Receiver, v. Industrial Board, 280 Ill. 526, this was competent evidence of an adjudication of the interstate com-

merce question. Troxell v. D. L. & W. R. R. Co., 227 U. S. 440, is not in conflict; it was there held that because of lack of identity of parties and causes of action a former judgment was not res adjudicata as to a question not there litigated. The judgment of the Industrial Board is of the kind described in Hanna v. Read, 102 Ill. 596, not a bar to the action but an adjudication of a specific fact which is conclusive upon the parties. (2) Justice and public policy would seem to demand that the defendant, having obtained a judgment upon a specific fact favorable to its contention, should be estopped to question its conclusiveness. (3) As the matter is not jurisdictional there is no reason why defendant's assertion in the first proceeding should not be competent as an admission of the fact.

The accident occurred in the Ashland avenue switching yard of the defendant, in which are many tracks and much movement of engines and cars. Near the east end of the yard were three curved, parallel tracks about eight feet apart; cars on them would be about four feet apart. The two southerly tracks were called main tracks, and the north track of the three is described as the round house lead. Morrissey was employed as a switchman and was experienced in his work. At this time he was riding on the forward footboard of one of defendant's switch engines which was running southwesterly on the round house lead. At the same time a St. Paul stock train was running in the opposite direction on the south main track, and a Michigan Central engine pushing a caboose was approaching on the main track between the switch engine and the stock train and in the same direction as the switch engine was moving. Opposite the point of the accident, south of the tracks, was a building where the switchmen ate their lunch. It was the noon hour, and it was apparently Morrissey's intention to leave the switch engine at

this point and cross over the main tracks in order to get his lunch in this building. The rear end of the stock train passed the building just as the switch engine arrived opposite. The switch engine was going slowly and Morrissey stepped from it and had taken a step or two in the direction of the building when the Michigan Central caboose struck him, with fatal results.

The crew of the Michigan Central engine and caboose, running upon the tracks of defendant with permission, must be regarded as the servants and agents of defendant, and their negligent conduct, if any, would be imputed to the defendant. C. & E. I. R. R. Co. v. Meech, 163 Ill. 305; Anderson v. West Chicago St. Ry. Co., 209 Ill. 329.

The declaration alleged generally the careless and negligent operation of the Michigan Central train.

The controverted points of fact relate to the speed of the Michigan Central train and any warning to Morrissey. The jury after considering the variant testimony could properly find that at this time many employes crossed the tracks at this point to reach the building for lunch; that the switch engine of defendant was approaching this point slowly, about five miles an hour, and it was apparent that the switchmen riding on it, including Morrissey, were alighting for this purpose; that the Michigan Central train approached this point at a rate of speed estimated by one witness, an experienced railroad man, as 15 or 18 miles an hour; others say somewhat less; a rule of defendant limited the speed in the yard to nine miles an hour. It is well within the evidence that the speed, at this time and place under such circumstances, was excessive and dangerous.

The Michigan central caboose was equipped with a tail signal whistle, part of the regular equipment of such cars;

its purpose was to give warning of an approaching train when backing. A man was stationed at the end of the caboose, charged with the duty of giving such warning. Although there is sharp conflict in the testimony, the jury could properly find that on this occasion this man knew that Morrissey was on the footboard of defendant's switch engine, with his back towards the caboose, and about to alight for the purpose of crossing the tracks to get lunch, and that the Michigan Central train was approaching at excessive speed and that the noise of the stock train and of other engines nearby might prevent Morrissey from hearing it. The jury reasonably could conclude that if the rear whistle had been sounded, as ordinary care required, it would have warned Morrissey effectively, but through negligence it was not sounded until too late.

The evidence touching a custom to blow the whistle at this point in the yard is not important, for manifestly the very purpose of the whistle was to give warning of danger under just such circumstances as these; otherwise it would be a mere toy.

We see no adequate reason to reverse the finding that plaintiff's allegations as to negligence were sufficiently supported by the evidence.

While under the Employers' Liability Act contributory negligence is not available, assumption of risk may be presented in defense. Boldt v. Pennsylvania R. R. Co., 245 U. S. 441.

What risk did Morrissey assume? Defendant says the risks which were the ordinary and usual incidents of his employment or open or apparent to him, or knowledge of which was chargeable to him because of his age, experience and opportunity to know. This may be so, but it does not follow that these comprehend every occurrence in which a switchman is struck; otherwise the master would be relieved from every obligation of reasonable care towards such employes. Not infrequently a railroad employe is injured

because of an unusual or extraordinary occurrence which he could not have anticipated or foreseen no matter what his age, experience or opportunity to know might be. Hartley v. C. & A. R. R. Co., 197 Ill. 440; C. & E. I. R. Co. v. White, 209 Ill. 124; Street's Stable Car Line v. Bonander, 196 Ill. 15; I. I. & I. R.Co. v. Otstot, 212 Ill. 429; Devine v. C. R. I. & P. Ry. Co., 266 Ill. 248; C. & N. W. Ry. Co. v. Kane, 70 Ill. App. 676. These cases decide that the unusual, unforeseeable hazard is not assumed. Applying this rule, the jury reasonably could conclude that Morrissey did not assume the unusual and unforeseeable risk due to excessive speed at this time and place under the existing circumstances, nor the failure to use the warning whistle, and certainly did not assume the extraordinary risk from a combination and synchronism of these negligences.

To argue that Morrissey assumed the risk of being injured through failure to look out for himself, is to plead contributory negligence under the guise of assumption of risk; in this action contributory negligence, however named, is not available for defense.

It is not the law of this state that defendant's employe assumed the risk of negligence of the Michigan Central's employes as one of the ordinary risks. Anderson v. West Chicago St. Ry. Co., 200 Ill. 332; Hart v. C. & G. T. Ry. Co., 209 Ill. 418; C. & E. I. R. Co. v. White, 209 Ill. 131.

We do not think the verdict was excessive, even considered as the amount remaining after deduction on account of contributory negligence. The deceased was 24 years of age, in good health, earning $1,300 to $1,500 a year, and giving his wife $100 to $120 a month which she used for the support of herself and infant son. In very many cases under similar circumstances judgments for $15,000 and for much more have been held not to be excessive.

because of an unusual or extraordinary occurrence which could not have anticipated or [illegible] ordinary care, experience or [illegible]. [illegible] v. [illegible] R. R. Co., 107 Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. 144; Street's [illegible] v. [illegible], [illegible] v. Osgood, 215 Ill. [illegible]; [illegible] 248; C. [illegible] v. [illegible], [illegible] 1[illegible] aide that the unusual, unforeseen [illegible] applying this rule, the jury reasons [illegible] did not cause the unusual and unforeseen [illegible] speed at this time and place under the [illegible], nor the failure to see the [illegible] train, [illegible] were the antecedent [illegible] these conditions.

[illegible] jured through failure [illegible] tributory negligence on [illegible]; in this action contributory [illegible] able for [illegible].

[illegible] plove [illegible] employes [illegible] 2[illegible] 118; [illegible]

[illegible] tributory [illegible] mental, [illegible] to [illegible] fact [illegible] for [illegible] [illegible].

In Devine v. C. R. I. & P. Ry. Co., 266 Ill. 248, a judgment of $15,000 was affirmed, and in I. & C. N. Ry. Co. v. White, 120 S.W. Rep. 958, where the deceased was a switchman, a judgment of $25,000 was upheld. There are many other such cases.

Complaint is made of errors in the rulings on evidence; some doubtful rulings were corrected and we find nothing of sufficient seriousness to require reversal.

Misconduct of counsel for plaintiff is charged, supported by a long list of verbal transgressions. These are mostly retorts which a closely contested trial generally evokes and which frequently are close to the line of safety. In holding as we do, that nothing demanding a reversal is presented, we do not necessarily approve of everything said.

The conduct of the trial judge is also called into question. It would be wasteful to narrate the acerbities of attorneys or the comments of the court. Obviously the court attempted to rule fairly and impartially between combating counsel, and we are of the opinion that he succeeded.

What we have said on the applicability of the Federal Employers' Liability Act, the proof of negligence and assumption of risk, makes the criticisms touching many of the instructions pointless; and there is no reversible error as to the others.

For the reasons above indicated the judgment is affirmed.

AFFIRMED.

In Levine v. [illegible], [illegible] [illegible] [illegible], [illegible] [illegible] [illegible] [illegible] of $[illegible]$ was [illegible]. and in [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] Rep. [illegible], where the [illegible] [illegible] [illegible] [illegible] was upheld. There [illegible] [illegible].

[illegible] is a [illegible] of [illegible] [illegible] [illegible] [illegible] some doubtful rulings were [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

197 - 24119

212 I.A. 667

GARDEN CITY FAN COMPANY,
Appellee,

vs.

J. F. SCHULER COMPANY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the defendant for $263 on a directed verdict in a suit brought to recover the contract price of a heater and fan sold by plaintiff to defendant.

The heater and fan were sold under a written contract, and defendant claimed as set-off damages because of failure of the guarantee and also for money spent for labor and materials furnished at the request of plaintiff. The defendant is in the business of installing heating and blower systems, and had a contract with the Purer Ice and Ice Cream Co. of Chicago to furnish and install a heating apparatus in its plant under a guarantee that it would be ample in size and capacity to maintain certain specified temperatures in the shop, stock room and offices in the coldest winter weather. John C. Schuler, representing the defendant, took this contract to the office of the plaintiff and presented it to a Mr. Lindeman, plaintiff's engineer, together with plans and sketches of the building in which it was proposed to install the heating plant. Plaintiff was informed that defendant desired that plaintiff should furnish the heating apparatus described in defendant's contract with the Ice Cream Company, with the same guarantee to the defendant. This was accordingly done and plaintiff gave a written agreement to defendant to furnish it the apparatus called for in defendant's contract with the Ice Cream Company and containing the same guarantee

as to temperatures. The apparatus was delivered and installed in the building of the Ice Cream Company. There is abundance of evidence tending to show that it failed to maintain the temperatures guaranteed. Frequent conferences were had between the various parties, and at the suggestion of plaintiff the defendant made certain changes in the matter of flues and openings, at an expense of $54. There also appears in the record an admission by the representative of the plaintiff that the cause of the failure to maintain the required temperatures was that the plant was not large enough. It would seem, therefore, that there was sufficient evidence as to the failure of the guarantee of the plaintiff to go to the jury upon the question of the breach of warranty claimed by the defendant.

We are of the opinion, however, that defendant failed, except as to the item of $54 above referred to, to introduce any proper evidence as to the measure of its damages. The only testimony touching this is the statement that there is still a balance due to the defendant from the Ice Cream Company. The correct measure of damages where the article sold is retained by the purchaser, which is the fact here, is the difference in value between the article furnished and that which was called for by the contract. No such evidence appears.

We are of the opinion that the item of $54 above referred to is properly chargeable to the plaintiff and that defendant is entitled to credit for this amount against the contract price of $263. If the plaintiff within twenty days from this date will file a remittitur of $54 the judgment will be affirmed; otherwise it will be reversed and the cause remanded.

AFFIRMED UPON REMITTITUR.

[illegible]

278 - 24205

212 I.A. 667

NANNY A. HAGG, Administratrix of the Estate of C. HERMAN HAGG, dec'd,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

C. Herman Hagg was struck and killed by one of defendant's street cars. The administratrix brought suit for damages, and upon trial had a verdict for $7,440 upon which judgment was entered. Defendant asks for a reversal.

The accident happened about 8:40 p. m. on January 29, 1913, a dark, foggy and cold evening, on Broadway, a north and south street in Chicago, near Peterson avenue, which runs into Broadway from the west but does not extend east. A northbound car carrying Hagg, running on the east track on Broadway, had stopped near the south line of Peterson avenue. He alighted and, passing behind that car and going westerly, was struck by a southbound car running on the parallel west track. The declaration says this was caused by the (1) general negligent management of the southbound car, and (2) its high and dangerous speed.

To support these allegations there is testimony tending to show that the southbound car approached the standing northbound car at a rate of speed estimated at 20 or 25 miles an hour; it is described by one witness as "awful speed." Another passenger, Gouders, had also alighted from the northbound car; he crossed the west track in front of the southbound car at a point north of the point at which Hagg attempted to cross. The motorman of the southbound car saw Gouders and

ZASRY A. HAGG, Administrator of the Estate of C. [illegible] HAGG, Deceased,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

slowed down sufficiently to allow him to pass safely, but at this time failed to see Hagg, and after watching Couders go safely across he increased the speed of the car, striking Hagg, who was nearly across, with the west corner of the car. Hagg was a heavy man, weighing about 200 pounds, but was thrown southwestly through the air 15 or more feet; almost all the bones on his right side where the car struck him were fractured; other injuries also indicate that he was struck with great force. The motorman did see him an instant before he was struck and put on the emergency brake and used his best efforts to stop the car, but did not succeed until it had run a distance said by one witness to be 200 feet; the motorman says it was 45 feet.

Under such circumstances the jury could properly conclude that this was not a case of one street car passing another, both moving at the usual speed between blocks, but that the southbound car should have approached the other car at the speed required by reasonable and ordinary care in passing a standing car from which passengers were alighting, and that having slowed down for one alighting passenger this diminished speed should have been maintained until Hagg had also passed in safety; that the defendant failed in both these particulars and ran the car at a high, dangerous and reckless rate of speed, as alleged in the declaration.

The allegation of general negligence in the management of the car would include failure of the motorman to keep a lookout. There is sufficient evidence to support this; he saw and watched Couders, but seemed to assume that this was the only passenger from the other car, and not only did not see Hagg, who could easily have been seen, but did not look for anyone else.

Was Hagg guilty of contributory negligence? He was 46 years of age, healthy, hearing and eyesight good. There is

evidence tending to show that both he and Gouders alighted from the front end of the northbound car; that Gouders turned west in front of that car, while he went to the rear of and behind it; that he stepped into the space between the tracks and saw the approaching southbound car; that he stepped back for a moment and then started across the west track. It is strongly urged that it was negligence for him to leave the point of safety to which he had retreated purposely to avoid the danger on the west track, and then rush onto the path of the southbound car when it was so near that it could not be stopped before hitting him. To this counsel for plaintiff reply that the fact he looked for and saw a car approaching from the north and, apprehending the danger, stepped backward, was evidence that he was not lacking in care for his own safety but was using reasonable prudence to avoid injury, and that his movement across the track was the result of his judgment of the situation which was reasonably induced by the peculiar circumstances. The jury evidently was in accord with the theory that Hagg saw the southbound car when he first alighted, and assumed that it would pass the standing car at a moderate rate of speed; that after passing behind the northbound car he saw the other car close by and stepped back; that he then saw it slow down to permit Gouders to pass, and concluded that the motorman had seen both of them and was slowing for him as well as Gouders. Accepting this as offering a safe crossing he started across the track, but the motorman, not seeing him, put on full speed, which caused Hagg to jump forward in the hope of escaping, but unsuccessfully. We cannot say that the jury was manifestly wrong in the conclusion that Hagg while exercising reasonable and ordinary care for his own safety made an error of judgment excusable under the circumstances. This being so, he was not guilty of contributory negligence. Wagner v. C. & A. R. R. Co., 265 Ill. 245.

We are not unfamiliar with the persuasive list of cases in which courts have held under general circumstances somewhat like those in the instant case that the injured person was guilty of contributory negligence, but as said in Stack v. E. St. L. Ry. Co., 245 Ill. 308, involving similar circumstances: "It is not an extremely unusual situation, and each case, as it arises, must be determined on its own facts."

There was no reversible error in the rulings on instructions. Some offered by the defendant and refused might properly have been given, but the essential matters in them were sufficiently covered by other instructions. The error asserted to be in plaintiff's given instruction No. 10 in its omission of the factor of the number of witnesses in determining the preponderance of evidence, is cured by defendant's given instruction No. 13, where this element is mentioned. Plaintiff's instruction is not mandatory but permissive.

There was no error or impropriety in the argument of plaintiff's counsel. The prefatory words, "I say that," of which complaint is made, are not indicia of testimony but are merely intended to give emphasis to the argument.

As we are not persuaded that we should disturb the verdict, and as there were no errors upon the trial, the judgment is affirmed.

AFFIRMED.

We are not unmindful of, the persuasive list of cases in which courts have held under analogous circumstances that the injured case that the injury arose as a result of contributory negligence, but as said in Lynch v. L. & N. Ry. Co., 245 Ill. 478, involving similar circumstances: "It is not an extremely unusual situation, and from case, as in cases, must be determined on its own facts."

There was a preliminary fact, in the issues on instructions. Some altered by the [illegible] and [illegible] proofs have been given, but the [illegible] sufficiently covered by other instructions. Therefore [illegible] to be in plaintiff's favor instructions so, it is in a [illegible] of the factor of the [illegible] in [illegible] the preponderance of evidence. In [illegible] instruction No. 16, there this element is [illegible]. Instructions instruction is not misleading nor erroneous.

There was no error in [illegible] of plaintiff's counsel. The [illegible] which complaint is made, are not [illegible] merely intended to give [illegible].

We are not [illegible] verdict. and so there was no error [illegible] ment is affirmed.

1662

GEN. NO. 6836. OCTOBER TERM A. D. 1917. AG. NO.82

EARL MILLER Et Al, Appellees

vs.

212 I.A. 668

WILLIAM BOTWINIS Et Al, Appellants

Appeal from the Circuit Court of Sangamon County.

ELDREDGE, P. J.

While there were orginially were parties to this suit Earl Miller, Marie Miller and Ralph Miller are the only appellees and William Kurilos is the only appellant, now before the court, the rest of the parties having been dismissed out of the case. Appellees are the minor children of William Miller, deceased. Appellant was a saloon keeper in the City of Springfield. This suit is brought under the ninth section of the dramshop act and the charge is that appellant sold and gave intoxicating liouors to the father of appellees to such an extent as to create in him, and did thereby create in him, a suicidal mania under the influence of which he took his own life, and that thereby appellees were deprived of their support. The jury returned a verdict for appellees, fixing their damages at $2000. There was a judgment on the verdict.

It cannot be doubted that if the facts are that the father of appellees committed suicide as a result of insanity temporary or otherwise caused by intoxication produced in whole or in a substantial part by the use of intoxicating liquor sold or given to him or to someone else for him, then appellant would be liable to appellees

to the extent that they were injuried either in their property or in their means of support, and we do not understand appellant to contend otherwise. He, however argues that those facts were not supported by the weight of the evidence in this record. The jury who tried this case found that they were so proven and a careful scrutiny of the evidence forces us to conclude that the jury was right. It is certain there is nothing in this record from which we can hold that they were manifestly wrong and that is the condition of mind we must be in before we would be warranted in setting the verdict aside for that reason.

Four instructions asked for by appellant were refused by the court. The first of these was to the effect that if the jury believed from the evidence that the deceased committed suicide because of despondency res-

sulting from the fact that he was affected with tuberculosis, then appellees were not entitled to recover. The instruction announced a correct proposition of law, but there was no competent proof of any facts upon which to base such an instruction. There was proof that he was and had been for some years afflicated with that disease and a doctor was also permitted to testify that the wife of the deceased had told him after the act of suicide had been committed that deceased was despondent over his physical condition. There is no presumption that merely because a man is in bad health he is going to commit suicide, and the testimony of the doctor as to what the wife had told him was purely hearsay and incompetent.

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She could not bind her minor children by what she said out of court was the mental condition of her husband or the cause of it.

The second and fourth refused instructions were on the question of the burden of proof. Other instructions were given to the jury that fully and sufficiently defined to the jury the rule in relation to the burden of proof. A court is not bound at the risk of committing error to repeat even correct propositions of law in his instructions to the jury. When a proposition is once clearly stated in a series of instructions it is sufficient.

The third refused instruction told the jury that the declaration was not evidence and should not be so considered. It was not offered in evidence nor does it appear from this record that it was even read to the jury or that the jury ever saw it. The instruction was properly refused.

Fault is found by appellant because the court in his instructions given at the instance of appellees did not limit the damages appellees might recover to compensatory damages and did not expressly instruct the jury that punative damages were not recoverable. Without regard to what the law is on that point, the court limited the jury in at least two instructions to the allowance of compensatory damages. If appellant wished a more specific instruction by which the jury should be told that they were not authorized to give punative damages, it was his province to have asked for it; not doing so, he should not complain that appellees did not do so.

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It is lastly contended that the damages allowed are excessive. On the day of the trail Earl Miller was 7

years old, Ralph Miller was 12 years old and Marie Miller was 15 years old. They were each entitled to support from the father until they became of age. Earl lacked 15 years, Ralph lacked 9 years and Marie lacked 3 years of being of age. Together their loss represented the support of one child for 27 years or an average loss of them of a trifle less than $75 per year during their minority or less than $1.50 per week. The deceased in this case was at the time of his death without a very great earning capacity, but in figuring damages under this statute the earning capacity should be based on what he would have earned if his earning capacity was not impaired by the use of intoxicants. We are not prepared to hold that the evidence shows that the deceased even with his imparied ability to earn money would not contribut all told to the support of each of these three children at least $75 per year. If he would do that then the verdict is not too large.

There is no reversible error in this record and the judgment is affirmed.

Judgment affirmed.

167a

GEN. NO. 6866. APRIL TERM A. D. 1918. AG. NO. 19.

MARTINS-LEARY CO., Defendant in error.

vs.

LAWRENCE FUNK (et al), Plaintiff in error.

212 I.A. 668

Error to Circuit Court McLean County.

ELDREDGE, P. J.

On January 21, 1915, the defendant in error, as plaintiff, instituted an action in assumpsit against the defendants, Yontz Bonnett, Lawrence Funk (plaintiff in error,) Julius F. Funk, Lewis G. Stevenson and The Farm Product Company, to recover $310.00 upon an open account. The declaration consists of the common counts. The bill of particulars contains a large number of items covering goods, wares, merchandise, farm implements and repairs thereon. It also shows a number of cash credits on the account, paid at different times by the different defendants.

On January 23, 1915, Lawrence Funk, plaintiff in error, was served with summons. The return of the sheriff on this summons also gore the endorsement, "The within named defendants, Yontz Bonnett and Farm Products Company, not served by order of complainant's solicitor. The other within named defendants not

found in my county." The record also shows that service was had on "The Product Company" May 7, 1915; upon Julius F. Funk May 11, 1915; and upon Lewis G. Stevenson September 1, 1915.

On May 10, 1915, the defendant Yontoz Bonnett filed four pleas, and the case was set for trial for May 12th. On May 11th plaintiff in error was defaulted for want of appearance. On May 12th, when the case was called for trial, on motion of defendant in error the cause was continued until the next term of court. On June 29th, it being the last day of the April term, defendant in error had judgment entered against plaintiff in error for the amount sued for, $310.00, and the costs of suit. At this time the pleas of one of the defendants, Yontz Bonnett, were on file. The case had been continued until the next term of court, and at least one of the joint defendants had not at that time been served with summons. At the next term of court plaintiff in error made his motion to open up and set aside said judgment and for leave to plead, which was overruled.

This is an action brought upon a joint contract, and

judgment must be rendered against all the defendants or none, unless a defense is interposed which is personal to the defendant who makes it, such as infancy, coveture, lunacy, bankruptcy, and

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the like. Maston vs Ross, 185 Ill. App., 57. It is error to render final judgment against one co-defendant in such a case without disposing of the case as to the others. Grand Pacific Hotel Company vs Pinkerton, 217 Ill., 61. The Court has no power to enter seperate judgments against defendants severally when sued in a joint action upon a contract where all are served with process. It was proper to default plaintiff in error, but no judgment should have been rendered against him until a judgment could have been rendered against all of the defendants jointly. Gould vs Sternberg 69 Ill. 531; Jansen vs Grimshaw, 125 Ill., 468.

It is urged that plaintiff in error should have made his motion to set aside the judgment at the term when the judgment was rendered. The judgment was rendered against him on the last day of the term, without notice. The motion was made at the next succeeding term. However, this is not a question of diligence on the part of plaintiff in error, but one of the power of a court to enter judgment against one of several joint defendants in an action ex-contractu without disposing of the case as to the other defendants served with process. This is a writ of error to review the judgment rendered and could be prosecuted at any time within three years from the rendition thereof.

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The judgment of the Circuit Court against plaintiff in error is erroneous and is reversed and the cause is remanded.

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GEN. NO. 6869. APRIL TERM A. D. 1918. AG. NO. 22.

THE PEOPLE'S STATE BANK OF CHANDLERVILLE, Appellant

vs.

TILLIE ZOOK LYNN, Appellee

212 I.A. 668

Appeal from Circuit Court Cass County

ELDREDGE, P. J.

In 1906 Berry Zook, the former husband of appellee, became indebted to appellant, and executed his promissory note in the sum of $95.60 as evidence of the debt. This note was subsequently renewed by him a number of times, and on several of these occasions he took the renewal note home with him, had his wife also sign it, and then returned it to the bank. On January 12, 1912, Berry Zook, according to the testimony introduced on behalf of appellant, again renewed the note, and he himself signed his wife's name to the same, telling the cashier he was busy and in a hurry, and that if he signed his wife's name to the note it would be all right with her. Berry Zook died December 29, 1912, and appellee subsequently married Henry C. Lynn. On February 10, 1913, the cashier of the bank met appellee on the street in Chandlerville, asked her to step into the bank and

told her he would like to have the notes she was on fixed up. He had a note for her to sign already prepared for the principal sum of $127.95. Appellee signed the note under the impression that it was to take the place of one of the former notes she herself had signed as surety for Berry Zook. After she signed this note, the cashier testifies that he delivered to her two notes, one for the principal sum of $95.00 and one for $25.00 both of which were signed by Berry Zook, and who had also signed appellee's name to each of them. Appellee testifies that only the $95.00 note was delivered to her. When she saw these notes she told the cashier that she had never signed them and that the signatures thereon were not her signatures. The cashier said to her that he knew that, but that her husband had signed her name to the notes and said it would be all right. Appellant subsequently brought suit before a justice of the peace against appellee to recover on the note for $127.95 in question, and on appeal to the Circuit Court a verdict and judgment was rendered in favor of appellee.

It is insisted by appellant that because appellee

failed to file an affidavit under Sec. 4 of Art. 6, Chap. 79, Hurd's R. S., denying the execution of the note, the evidence introduced by her was inadmissible. Appellee did not claim that she did not

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execute the note, but contends that her execution thereof was obtained by falsely representing to her that it was to take the place of a prior note, or notes, which she had signed as surety for her husband. The undisputed facts show that there was no meeting of minds between appellant and appellee in the transaction, and that the execution of the note by appellee was without consideration.

The judgment of the Circuit Court is affirmed.

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169a

GEN. NO. 6880. APRIL TERM A. D. 1918. AG. NO. 31.

F. L. SCHLIERBACH, Appellant

vs.

GEORGE W. MARSLAND, Appellee

212 I.A. 668

Appeal from Circuit Court Christian County.

ELDREDGE, P. J.

The bill in this case was orginally filed in the City Court of the City of Pana, Illinois, by appellant, and avers that appellee was at that time clerk of said court, and had entered into an agreement with the solicitor of appellant, whereby appellant would be permitted to file certain cases in said court without first paying the court costs; that in cases where collections were made by executions or compromises appellee was to have the regular fee for filing the same, otherwise not; that pursuant to said agreement appellant instituted a certain number of cases in said court, and the filing fees [illegible] not prosecuted to judgments or compromises amount to $111.00 in court costs; that filing fees had been paid by appellant to appellee in those cases where collections were made, and that there is nothing due the latter in the others by virtue of said agreement; that appellee

had demanded the sum of $111.00 from appellant; that the same is illegal and unjust and should not in equity be paid; that the fees taxed in said cases are judgments at law and if a fee bill should be issued, appellant would be unable to interpose any defense at law. The bill concludes with a prayer for an injunction against appellee to restrain him from collecting the filing fees in each and every of the aforesaid cases, and perpetually enjoining the collection of the said $111.00 or any part thereof. A temporary injunction was issued by the City Court.

When appellant filed his bill in this case in the City Court he failed to pay the advance clerk's costs, and a motion was made by appellee to dismiss the bill on that ground. This motion was taken under advisement by the court and never acted upon. Later appellee was ruled to answer and he filed a demurrer to the bill and an answer. The demurrer was overruled to the bill, and exceptions were sustained to the answer. Subsequently an amended answer was filed. Appellee then took a change of venue to the Circuit Court of Christian County In the latter court a motion was made to dissolve the

temporary injunction for want of equity on the face of the bill. The temporary injunction was dissolved and the bill was dismissed for want of equity. On a hearing on the suggestion of damages on the dissolution of the

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injunction the court allowed $160.00 damages for solicitor's fees and $10.00 for the costs of the change of venue.

Two alleged errors are presented by counsel for appellant, one that the court erred in dissolving the injunction, and, second, that the damages allowed were excessive and illegal. It seems too clear for argument that a contract made by a clerk of a City Court or of any court established by the laws of this State, with an attorney on behalf of a client that the latter might institute a suit, or suits, in said court without paying the fees prescribed by law, unless the same could be collected from the defendant or defendants by prosecutions or compromises, is clearly void on the ground of public policy. In the case of Metropolitan Trust & Savings Bank vs Perry, 194 Ill App. 277, it was held, "It is unquestionably the law that any contract, by the terms of which a public officer is to accept or receive for his services, either more or less than the statutory fees, is contrary to public policy, and void."

It is next urged that the damages allowed are excessive. The sum of $10.00, the costs of the change of venue, should not have been allowed, as Sec. 12, Chap. 146, R. S., specifically provides that such costs shall be paid by the petitioner and not

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taken as part of the costs in the suit. The assessment of solicitor's fees as damages on the dissolution of an injunction is largely in the discretion of the chancellor, and there is no evidence in the record to show that they are in this instance excessive.

The decree in the Circuit Court is affirmed, except as to the $10.00 costs of the change of venue, the assessing of which as a part of the damages on the dissolution of the injunction, is reversed. The cause is remanded with directions to enter a decree in conformity with this opinion. 16-17 of the costs in this court are taxed against appellant and 1-17 thereof against appellee.

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17a

GEN. NO. 6889. APRIL TERM A. D. 1918. AG. NO. 40

THOMAS WALSH, Appellee.

vs.

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, Appellant.

212 I.A. 668

Appeal from Circuit Court Morgan County.

ELDREDGE, P. J.

Thomas Walsh, appellee, on the 12th day of April, 1917, was a traveling salesman, and in the course of his business as such drove into the Village of Hillview, Morgan County, in an automobile. The main highway through the village runs east and west, and in this highway, along the north side thereof, appellant maintained electric light poles at regular intervals. From near the top of one of these poles was attached a support or guy wire, which extended to the next pole immediately west of it, and was attached to the latter at a point thereon between 5 and 5½ feet from the ground. The highway was travelled both on the north and the south line of these poles, and there was a well-beaten track running under the guy wire from the highway into private property, referred to in the testimony as the McClay property, on which was erected a scale house.

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Appellee, after transacting his business with a customer whose store was located on the south side of the highway, got into his automobile, the top of which was up, with the intention of turning around and proceeding east to the City of Jacksonville. He first drove west between 40 and 50 yards, and attempted to turn around in the street. The top of the automobile being up, he could not see the wire, and did not know it was there. The wire caught the top of the automobile, slid down the bow, caught the plaintiff on the chin and made a cut in his face about three inches long, which penetrated to the bone. The muscles of the lip grew to the bone of the jaw, so that the use thereof to some extent has become impaired. He paid $22.00 for services of physicians and $35.00 for repairs to his automobile. He was earning at the time of the injury between $40.00 and $50.00 a week, and lost 19 days from his business by reason thereof. In the court below he recovered a judgment for $357.25, to reverse which appellant takes this appeal.

There is no controversy over the facts, but it is

urged by appellant that it was not guilty of negligence in maintaining the guy wire in the manner in question for the reason that an ordinance of the village granted it the privilege of errecting its

Page 2

poles in the streets thereof. The ordinance of the village could not relieve appellant from the duty of using ordinary care in the construction and maintenance of its poles and wires in the highway so as not to unnecessarily cause injury to persons using the same. The testimony of appellant's own witnesses shows that it was usual and customary to attach support or guy wires to poles when in a public highway at a distance of 7 or 8 feet from the ground so as to give free access to persons in vehicles passing thereunder. Appellee had a right to drive in that portion of the street in question, and he was bound by no duty to anticipate that a guy wire would be placed in the street so low as to strike his automobile in passing under it.

It is urged that the Court erred in permitting a plat to be introduced in evidence, because the proper foundation for its introduction was not made. There is no controversy over the fact that the poles and wire were in the highway, nor over the location of the buildings adjacent thereto. No harm resulted to appellant by its introduction.

The 15th instruction given by plaintiff on the measure of damages was not accurate in not confining the damages to those proven by the evidence, and if the damages had been large or

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excessive, we might have felt it our duty to have reversed the judgment. But the damages are moderate and well sustained by the evidence, and the giving of this instruction was harmless error. The criticisms of the other instructions are without merit and there is no reversible error in the record.

The judgment of the Circuit Court is affirmed.

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171a

GEN. NO. 6893. APRIL TERM A. D. 1918. AG. NO. 43.

WILLIAM HARLAN AND ALEX HARLAN,
Appellees,

212 I.A. 669

vs.

CHICAGO AND ALTON RAILROAD COMPANY,
Appellant.

Appeal from Circuit Court Macoupin County.

ELDREDGE, P. J.

Appellees recovered damages in the sum of $150.00 for the killing of a horse by a passenger train of appellant on a public street in the City of Girard.

On the morning of January 26, 1916, a nephew of appellees rode the horse in question to the home of a brother of appellees, and tied her to a post in front of the house with a rope. For some reason, and in some manner unexplained, the mare broke the rope and ran away down the street onto the tracks in front of an approaching train of appellant, was struck thereby and killed.

The Court directed the jury to find appellant guilty, and to assess appellees' damages at the sum of $150.00, and upon the verdict so rendered entered judgment for that amount.

The liability of appellant in this case is based upon the fact that the train, when it struck the mare, was running faster

than the ordinance of the city permitted. The proof showed that the mare was well broken and gentle and did not have the habit of halter pulling. A piece of the rope halter remained tied to the post. No evidence was introduced as to what condition the rope halter was in, but it is self-evident that if it had been in an ordinarily good condition, a perfectly gentle horse would not have broken it and run away. Whether an act of negligence is the proximate cause of an injury is ordinarily a question of fact for a jury to determine. In order for appellees to recover in this case it was necessary for them to prove that due care was used in tying the horse with a suitable halter to the post. No such evidence was introduced. The fact that the train in question was running faster than the ordinance of the city permitted is not conclusive proof under the evidence in this case, as a matter of law that the excessive speed of the train was the proximate cause of the injury to the mare.

The judgment of the Circuit Court is reversed and the cause remanded.

172a

GEN. NO. 6907. APRIL TERM A. D. 1918. AG. NO. 55.

JOHN KOENIG, ET AL, Appellees,

vs.

212 I.A. 669

ADOLPH HOCH and WILLIAM MEINERS,
Appellants.

Appeal from Circuit Court Macoupin County.

ELDREDGE, P. J.

The declaration in this case alleges that the plaintiffs are the minor children of one Micheal B. Koenig, deceased, and that appellants, together with one Charles H. Tiefenbruch, were keepers of dram shops. and in the life-time of said Micheal B. Koenig sold and gave to him intoxicating liquors which caused him to become and remain greatly intoxicated, and that by reason of such intoxication he became so mentally depressed, despondent and deranged that he drank some form of concentrated lye, or other poisonous substance, which caused his death, by reason whereof plaintiffs were greatly injured in their means of support. The defendant Tiefenbruch, by direction of the Court, was found "not guilty." A verdict was returned by the jury finding appellants guilty and assessing appellees' damages at the sum of $4500.00, and judgment was rendered on this verdict.

There is no reversible error in the admission of evidence or in the giving of instructions, and there is sufficient evidence to sustain the verdict. The judgment, however, is informal in that it is ordered and adjudged that the plaintiffs have and recover of and from the "defendants Hoch and Meiners, partners," the said sum of $4500.00, etc. The judgment should have been against them individually, and not as partners, as a copartnership firm is not liable for torts committed by the individual members.

The 13th and 14th paragraph of Sec. 6 of Chap. 7 R. S. provides that no judgment shall be reversed for any informality in entering a judgment, or for any fault or negligence of any officer of the court, by which neither party has been prejudiced. And Sec. 7 provides that such informal judgment may be corrected in the Court into which such judgment shall be removed by appeal or writ of error. The judgment will be corrected in this court, and entered against appellants by their individual names.

With the above correction, the judgment is affirmed at the cost of appellees.

173a

GEN. NO. 6916. APRIL TERM A. D. 1918 AG. NO. 61.

POFFENBERGER & MORRIS, Appellants,

vs.

212 I.A. 669

B. & O. SOUTHWESTERN RAILROAD COMPANY,
Appellee,

Appeal from Circuit Court Christian County.

ELDREDGE, P. J.

On May 6, 1916, near the railroad tracks of appellee, and upon its right of way in the Village of Edinburg, stood the elevator building of the Farmers Grain Elevator Company. A passenger train of appellee arrived at the depot in the village on that day about 12:09 o'clock P. M. and departed about 12:12 o'clock P. M.; after leaving the depot it passed the elevator building, which was about 275 feet therefrom. About 12:30 P. M. the elevator building was discovered to be on fire near the top thereof. A strong wind was blowing which caused the fire to be communicated to the store building of appellant, which was situated about 100 feet from the elevator. The store building and most of its contents were consumed, and this action was brought by appellants to recover damages from appellee for the loss occasioned thereby. The trial before the jury resulted in a verdict of "not guilty", and judgment was entered upon the verdict.

Instructions 4, 5, 6, 11 and 13 given on behalf of appellee attempt to state the rule in regard to the burden of proof in this class of cases. All these instructions state the same rule, but apply it to different counts and to the different allegations in the counts, and a determination of the propriety of one instruction will apply with equal force to the others mentioned. Instruction 4 is as follows: "The Court instructs you that as to additional count two of plaintiff's declaration, the burden of proof is upon the **plaintiff** to show by the greater weight of the evidence that the spark arresting device on the engine alleged to have set out the fire was **not** kept in good repair and condition, but that it was old, worn, bent, broken and out of repair, and if the plaintiff fails to prove this by the greater weight of all the evidence in the case, then as to additional count two of the plaintiff's declaration you should find the defendant not guilty." The statute providing that if it be established as a fact that an injury has been occasioned from fire set by sparks emitted from an engine of a

railroad company, then such fact is full **prima facie** evidence of negligence on the part of the company, was first passed in 1869. Since that time the construction of this rule of evidence has been enunciated by an

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unbroken line of decisions.

The rule of law announced in the above instruction, and in the others mentioned, is directly contrary to that which has always prevailed under a long series of decisions in this State. In the case of C. C. C. & St. L. Ry. Co. vs. Hornsby, 202 Ill. 138, the Court said, "Under this statute, it was only necessary for the appellee in the first place to establish a **prima facie** case of negligence against the appellant company by proving or by introducing proof tending to show, that the fire was caused by a spark from the engine * * * When such **prima facie** case was made, the burden of proof was then cast upon the appellant company to show either that the fire was caused by some other agency, or that its engine was equipped with the best and most approved appliances to prevent the escape of fire, and was in good repair, and properly and skillfully handled by a competent engineer." In the case of C. & A. R. R. Co. vs Glenny, 175 Ill. 238, it was held, "The statute upon which the action is based is a rule of evidence. Having made such allegations the plaintiffs had the right to invoke the statute as relieving them of the burden of proof after showing the fire was communicated from the defendant's locomotive and rest his case without proof of the particular facts constituting the negligence."

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To the same effect have been a large number of cases. C. & A. R. R. Co. vs Quaintance, 58 Ill. 389; L. E. & St. L. Con. R. R. Co. vs Spencer, 149 Ill. 97; Strawboard Co. vs C. & A. R. R. CO., 177 Ill. 513; First National Bank vs L. E. & W. R. R. Co., 174 Ill. 36; I. C. R. R. Co. vs Bailey, 222 Ill. 480. The instruction was erroneous as casting the burden of proof upon the appellants after they had made their **prima facie** case.

Instructions 2, 9 and 10 in different language attempt to announce the rule of law in regard to the degree of care imposed upon appellee in the equipping and handling of its engine. Instruction 2 is as follows: "The Court instructs you that the defendant is not an insurer against fire, and while the facts, if it is a fact, that a fire was discovered soon after the passage of a train might raise a presumption that fire had been started by the train, yet if you believe from the evidence that the defendant had used **reasonable** care to

equip the engine in question with one of the most approved spark arresting devices in common use and to keep such device in good condition and repair, and that the engine was properly handled by a competent and careful engineer, then any presumption of negligence on the part of the defendant would be rebutted, and the mere fact, if it was a fact, that a fire occurred soon after the locomotive passed would not be sufficient upon which

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to base a finding that the defendant was negligent." Reasonable care on the part of appellee was not sufficient but it was bound to prove, in order to rebut the **prima facie** case made by appellants, that at the time of the injury it had exercised the **highest** degree of care and diligence in having its engine equipped with the best and most approved appliances for the prevention of sparks, and that the same was in good repair and carefully and skillfully handled by a competent engineer. I. C. R. R. Co. vs Bailey, 222 Ill. 480; T. W. & W. Ry. Co. vs Larmon, 67 Ill. 68; C. & A. R. R. Co. vs Quaintance, **supra;** C. & A. R. R. Co. vs Pennell, 94 Ill. 448; L. E. & St. L. Con. R. R. Co. vs Spencer, **supra;** First National Bank vs L. E. & W. R. R. Co., **supra;** C. C. C. & St. L. R. R. Co. vs Hornsby, **supra.** These instructions are also subject to the criticism that they do not call the attention of the jury to the fact that the conditions mentioned should exist at the time of the fire. It is not enough to show that the engine was originally constructed with the best and most approved appliances for preventing the escape of sparks, but there must be proof that at the time of the injury the engine was so equipped and was in proper repair and skillfully handled. C. & A. R. R. Co. vs Quaintance, **supra;** C. & N. W. R. R. Co. vs Boller, 7 App. 625.

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It is urged as to this last series of instructions that the error in giving them was harmless because the proofs of appellee show that the appliances for arresting sparks upon the engine were of the best and most approved kind, were in good repair, and that the engine was skillfully handled by competent servants at the time of the fire. There was evidence introduced by appellee tending to establish these facts and to thus rebut the **prima facie** case made by appellant, but the credibility of the rebutting evidence was for the jury to determine, and whether it was sufficient to overcome the

presumption of negligence established by the **prima facie** case under the circumstances was a question of fact. L. E. & St. L. R. R. Co. vs. Spencer, **supra;** Chicago City R. R. Co. vs Barker, 209 Ill. 321; C. & E. I. R. R. Co. vs Crose, 214 Ill. 602. It was necessary for the jury, in order to arrive at a proper conclusion upon this question, to know and apply the correct rule of law in regard to the degree of care which it was the duty of appellee to have exercised.

The Court admitted in evidence the assessor's books to show the valuation of the building owned by appellants, which was burned. The assessor himself might have been a competent witness, but his valuation of the improvements on the land for the purpose

of taxation

could not bind the owner of the property as to such valuation for any other purpose. Lewis vs Englewood Elevated R. R. Co., 223 Ill. 223. In the present instance, however, this error was harmless as the jury found the appellee not guilty and the question of damages did not become involved in the consideration of its verdict.

For the errors indicated the judgment of the Circuit Court is reversed and the cause remanded.

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GEN. NO. 6763. OCTOBER TERM A. D. 1917. AG. NO. 10

212 I.A. 669

WILLIAM SHANNON & HARRIET E. SHANNON,
Administrators of the Estate of B. F. Shannon,
Deceased, Appellee,

vs.

MARY E. ORMSBY, Appellant

Appeal from the Circuit Court of Christian County

GRAVES, J.

B. F. Shannon, now deceased, was in his lifetime a tenant of one Charles A. Morrison. The annual rental for the premises was $145 per annum. During the last year of the tenancy Shannon paid Morrison $75 in cash on the rent. He also furnished Morrison and his family with milk to the amount in value of $43.60 which was not paid. While Shannon still owed Morrison $70 rent money and Morrison still owed Shannon $43.60 for milk, Morrison died, and appellant became the owner of all his property and the administratrix of his estate. Prior to the expiration of time for filing claims against the estate of Morrison, appellant had a conversation with a representative of Shannon in which she demanded that he pay her the full years rent, and Shannon's representative told her that $75 of the rent was already paid and that Morrison owed the $43.60 milk bill and offered to settle on that basis. The evidence offered by appellees tends to show that after some talk about these claims, in which appellant questioned the truth of the statement that Shannon had paid $75 on the rent, appellant said to the representative of the Shannons that she

needed all the money she could get to pay the expenses of a trip she was about to make, and if he would pay her the $70 due on the rent then, in cash, she would on her return pay the milk bill of$43.60 and that on the strength of that promise he gave her a check for the $70. Appellant denied ever making any promise to pay the milk bill. There was some corroborating evidence on both sides as to whether or not appellant made the promise. If appellant made the promise as appellees claim, then it was an original promise based on a valid consideration and Shannon was entitled to a verdict and judgment against appellant. The statute of frauds does not apply to such a promise. The jury found the issues for the plaintiff,

appellees here and assessed their damages at $43.60, and we are not able to say the finding was not warranted by the evidence. A judgment against appellant followed the verdict.

Some criticisms on the action of the court in the admission and exclusion of evidence and in the giving of instructions have been made by attorneys for appellant, but a careful examination of them discloses no reversible error. The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

appellees [illegible] the de[illegible]
we are not able to [illegible]
the evidence [illegible]
the verdict.

Some [illegible]
[illegible] admission and [illegible] of evidence [illegible]
instructions [illegible]
[illegible]
error. The [illegible]
affirmed.

No. [illegible]

Judgment affirmed.

175a

GEN. NO. 6776. OCTOBER TERM A. D. 1917. AG. NO.16

L. B. SCRANTON, Appellee

vs.

212 I.A. 670

CHICAGO & ALTON R. R. CO., Appellant

Appeal from the Circuit Court of Pike County.

GRAVES, J.

This suit was begun to recover the value of two horses owned by appellee, that were killed on the tracks of appellant by a passing locomotive. After a verdict by a jury appellee obtained judgment against appellant for $250 and $50 attorneys fees.

The controverted question of fact at the trail and here is whether or not the horses were on the public highway when they were killed. Appellant has at all times contended, and on the trail offered proof to show that they were on the public highway at the time, while appellee claims and undertook to prove that they were on the right of way of appellant to the east of the public highway, and that they entered upon such right of way through a gap in the fence of appellant of which appellant had knowledge but negligently allowed to remain unrepaired. As this case must be reversed for manifest errors in the record and remended for another trail, we refrain from commenting on the weight of the evidence.

Appellee to prove his contentions offered proof of tracks on the right of way of appellant which he claimed were the

Page 1

tracks of his horses and which different witnesses claimed to have observed at various times from a few hours to a day or more after the killing. It is claimed by appellant that it was error to permit this proof of tracks observed at a time remote from the killing without proof that the conditions were the same as at that time. The point is well taken. Tracks observed days or even hours after the killing could prove nothing unless they were there before or at the time of the killing. In that same connection appellee was allowed to testify over objection of appellant, that the tracks observed were, or in his opinion were, the tracks of one of his horses. While it would have been competent, after showing that het tracks were there at or about the time of the killing, to prove their size, shape and peculiarities and the size, shape and peculiarities of the feet of the

GEN. NO. 6776. OCTOBER TERM, [illegible]

I. R. STRANTON, [illegible]

v.

CHICAGO & ALTON [illegible]

Appeal from the [illegible]

GRAVES, J.

This suit was [illegible] horses owned by appellee [illegible] of appellant by a [illegible] by a jury appellee obtained [illegible] for $250 and $50 [illegible]

The controversy [illegible] here is whether [illegible] highway when they were killed. Appellant [illegible] times contended, and on the trial offered proof [illegible] that they were on the highway. The evidence [illegible] appellee claims and undertook to prove that they were on the right of way of appellant [illegible] the highway, and that they were [illegible] way through a gap in the fence of appellant [illegible] appellant had knowledge that [illegible] in motion [illegible] manifest errors in the [illegible] trial we refrain from [illegible] evidence.

Appellee to prove [illegible] tracks on the right of way of appellant [illegible] ed were the [illegible]

[illegible]

witness [illegible] and at [illegible] from a few hours [illegible] after [illegible] proof of [illegible] ing with [illegible] [illegible]

horses and leave it to the jury to determine whether they were the tracks of appellees horses and when they were made, it was a usurpation of the province of the jury and manifest prejudicial error to permit a witness to testify or express an opinion that the tracks were made by such horses. Proof was also admitted over objection of appellant that the horses killed were all appellee had. This was also error. It tended to inflame and prejudice the jury. It would have been equally as proper to admit proof that appellee was a poor man and had a large family.

In instructing the jury the court repeated several times in-

structions on the credibility of witness. While the repetition of a correct proposition of law in a set of instructions will not always be regarded as a prejudicial error, it is a course that should be condemned. One clear cut statement of any proposition of law contained in a set of instructions is enough in any case while a repetition of such proposition is likely to magnify it in the minds of the jury and cause a miscarriage of justice.

In appellee's instruction 6 the court told the jury that they were "not bound to take the testimony of any witness as absolutely true, and you should not do so, if you are satisfied, from all the facts and circumstances proven at the trail, that such witness is mistaken in the matters testified to by him, or that, for any other reason his testimony is untrue or unreliable." The last clause of this instruction left to the jury the option to disregard the testimony of any witness, if for any reason, whether it was shown upon the trail or not, they believed his testimony was unreliable or untrue. That is not the law and in this case it was reversable error to give this instruction. It is only for such reasons as appear on the trail that a jury may disregard the testimony of any witness.

For the errors pointed out the judgment is reversed and the cause is remanded.

Reversed and remanded.

176a

GEN. NO. 6777. OCTOBER TERM A.D. 1917. AG. NO.73

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error

vs.

JAMES WEBB, Plaintif in Error

212 I.A. 670

Error to County Court of Champaign County, Illinois.

GRAVES, J.

Plaintiff in error was charged with having sold intoxicating liquor at various times in the months of April and May, 1917, in the town of Champaign in the County of Champaign, which is said to be anti-saloon territory. He was tried in the County Court of that county and found guilty by a jury as charged in seven counts of the information. In due time sentence was pronounced on the verdict. The record is brought here for review by plaintiff in error, who was defendant in the county court. He complains that the evidence introduced on the trail does not show beyond all reasonable doubt either that the town of Champaign was at the time anti-saloon territory or that he made seven sales of intoxicating liquor.

To prove that the town of Champaign was anti-saloon territory the state offered in evidence a certificate of the town clerk of the town of Champaign showing that at an election held in that township on April 7, 1908 the question "shall this town become anti-saloon territory" was voted on and that the proposition carried. Four other certificates were offered showing that at elections held on April 5, 1910, April 2, 1912, April 7, 1914, and April 4, 1916 respectively, the question "shall this town continue to be anti-saloon territory"

was voted on and that the proposition carried. These certificates are in strict compliance with Section 7 of the local option act under which this case was prosecuted. That section provides that the results of such elections may be proved in all courts and in all proceedings by the official certificates of the clerk. A certified copy of the record is not required. Certificates like those introduced in this case have been held sufficient to show the facts certified to. **People v. Danley** 181 Ill. App. 80, **People v. Willi** 147 Ill. App 207, **People v. Davis** (Ill. App 3rd Dist. not yet reported.) It is only in a direct contest that the correctness of the result of an election can be questioned and the certificate of the clerk showing such results cannot

be impeached in a collateral proceeding. People v. Willi (Supra).

As to the number of sales the evidence shows James Gaynor testified that he purchased of Webb two bottles of beer and two half-pint bottles of whiskey at different times in January 1917, and two half-pint bottles of whiskey in May of the same year. Otis Clouser testified that he bought whiskey of him at least four times. Claud Goddard testified that he bought of defendant two bottles of beer at one time, at another time a drink and a pint bottle of whiskey, and the testimony of none of these witnesses is denied. It, therefore, appears that while he was convicted of only seven sales at least twelve sales were proven against him.

The evidence amply supports the verdict and the judgment is affirmed.

Judgment affirmed.

177a

GEN. NO. 6787. OCTOBER TERM A. D. 1917. AG. NO. 22

INDEPENDENT OIL COMPANY a Corporation,

Appellee

212 I.A. 670

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

a Corporation, Appellant

Appeal from the Circuit Court of Macon County

GRAVES, J.

This is an appeal by the Railroad Company from a judgment against it for $300 for damages to an oil wagon of the plaintiff corporation by reason of a collision between it and a certain locomotive drawing a train of cars.

The team hitched to the oil wagon in question was being driven by a servant of appellee by the name of Ehrhart along Harrison Avenue just outside of the city of Decatur, Illinois. Harrison Avenue runs east and west and is 66 feet wide. The right of way of appellant runs in that loaclity in a northwesterly and southeasterly direction. Southeasterly from the crossing of Harrison Avenue and the railroad right of way there is a cut so that the railroad tracks are considerably lower than the natural surface of the ground. There is also there an embankment between the railroad track and the avenue. There were at that time weeds and houses that prevented persons travelling westward on the avenue from seeing the approach of trains from the east until they were about to cross the tracks, when they could, if they looked that way, see up the tracks approximately 150

feet. All these conditions were known to Ehrhart the driver of appellee's team on the day in question. He also knew there was a train due to pass over that track at that crossing at about the time he was approaching. Knowing these conditions Ehrhart did not stop his team but drove them on to the track and before the wagon had cleared it, it was struck by the locomotive of the train that was then due to pass that point. Ehrhart testified that his wagon made but little noise and that he both looked and listened for the train, but neither saw nor heard it approaching; that he was looking in the direction the train came from all the time except once when he just "glanced" the other way and then looked back again and when he did so the train was almost upon him, or as he expressed it "I don't believe it was more than

ten feet from me." To state the situation briefly, Ehrhart knew all about the situation in which he found himself. He knew of the danger and of the fact that an approaching train could not be seen for more than 150 feet from the crossing. It is not claimed that he is of tender years, an imbecile or deprived of any of his natural faculities. When a person finds himself exposed to known dangers it is his duty to exercise care for his own safety commensurate with the known dangers, and may not heedlessly disregard them and then complain if he is injured. **C. C. C. & St. L. Ry. Co. vs. Arbaugh** 47 Ill. App. 360, **I. C. R. R. v.McMillion** 129 Ill. App. 27. Reasonable minds cannot differ on the question whether Ehrhard was at the time of the collision conducting himself

as an ordinarily prudent person would have done under the same or similar circumstances. He not only failed to so act but was culpably, palpably and grossly negligent. Under the universal rule to which we know no exception that the negligence of the servant must be imputed to the master and will prevent recovery by him for injuries to which the negligence of the servant contributes, the negligence of Ehrhart must be imputed to appellee and bar it from recovery in this case.

The judgment of the Circuit Court is reversed with a finding of fact to be incorporated in the records of this court, that the negligence of Ehrhart, the servant of appellee, was the proximate cause of the collision in which its property was injujred.

Reversed with a finding of fact.

178a

GEN. NO. 6815. OCTOBER TERM A. D. 1917. AG. NO.46

NATIONAL BANK OF MATTOON, Appellee,

vs.

CHARLES T. WELCH, Appellant.

212 I.A. 670

Appeal from the City Court of Mattoon, Coles County, Illinois.

GRAVES, J.

In 1906 Chester A. Aldrich borrowed of the First National Bank of Mattoon $1000 and appellant signed the note as security. Aldrich at that time also placed in the hands of the First National Bank 150 shares of stock in the Morning Star Printing Co. as collateral additional security. On July 1, 1911 the "National Bank of Mattoon," the appellee here, took over the business of the "First National Bank of Mattoon." Among the assests of that bank that were so acquired by appellee was the Aldrich $1000 note already mentioned. On this note the interest had been paid but none of the principal. In the meantime and about March or April 1911 the Morning Star Printing Company went into liquidation and after all its assets had been marshalled and distributed among its creditors there remained a considerable sum of debts yet unpaid and its capital stock was then and has since remained worthless. On October 10, 1911 the note sued on in this case was given by Aldrich to appellee in renewal of the original note and appellee signed this renewal note as security. This renewal note was held by appellee until November 13, 1916, when judgment by confession was entered on it for $986.92

the balance then due thereon. Later that judgment was opened up and appellant was let in to plead to the merits and to defend. At the trial there was read into the record as a stipulation a statemnet of the attorney for appellant made in open court in the following words:- "We admit the execution and delivery of the note and that unless the defendant does show under these pleadings and the evidence a payment in legal effect, that the plaintiff is entitled to recover the face of the note with interest and attorney's fees, provided in the note." Appellant does not claim that he had paid the note but insists that appellee is in some way at fault in failing to realize on the certificates of capital stock of the Morning Star Printing Company that was originally in the hands of the old First National Bank of Mattoon as col-

lateral security.

The proof shows that these shares of stock were turned over by the president of the old First National Bank of Mattoon to Fred A. Kinzel, who was then settling up the affairs of the Morning Star Printing Co. before that bank turned the old note over to appellee and before the renewal note was executed; that at the time the note sued on was executed the stock was not in the possession of any of the parties to the note; that no mention of this stock or of any other collateral is made in the note sued on; that the stock never came into the possession of appellee until some time in 1916, or about three years after the note in question was executed; that during all that time the stock was worthless; that appellant never requested either of the banks to sell the stock or realize on it; that appellant

Page 2

in 1915 told the officers of appellee bank that if the bank would deliver to him the shares of stock he would pay the note; that soon thereafter and in 1915 the bank obtained the stock in question and tendered it to appellant and demanded that he pay the note according to promise; that appellant then said "I will see my attorney first" but did not pay it, and that in any event appellant lost nothing by reason of the failure of appellee to sell the collateral in question.

At the close of all the evidence the court instructed the jujry to find the issues for appellee, which it did. Under the facts recited the right of appellee to recover was one of law and was clear. The peremptory instruction was properly given. The judgment of the City Court is affirmed.

Judgment affirmed.

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177

GEN. NO. 6818. OCTOBER TERM A. D. 1917. AG. NO.49

KATHERINE BEAZEL, Appellee

212 I.A. 670

vs.

GEORGE S. BEEKMAN, Appellant

Appeal from the Circuit Court of Sangamon County.

GRAVES, J.

Appellee rented from appellant a private garage. The leasing came about by appellee's reading an advertisement published at the instance of appellant as follows:—

"For Rent. Two garages, heated, concrete floor, $3.00 621 West Lawrence Avenue. Bell 4721."

After reading this advertisement the parties consumated the leasing by oral agreement. The testimony shows that during the conversation in which the leasing was consumated appellant told appellee the garage was heated the same as the flat with which it was connected, and that she would get heat the same as she was getting at the Cadillac garage. On January 13, 1916 the water in the radiator and cylinders of the car froze and the cylinders were cracked. When appellee and her husband discovered that the water in the car was frozen they examined the radiator in the garage from which it was supposed to be heated and found it cold, and the janitor absent. The temperature out of doors was below zero. This suit was brought to recover the damages done to the car by the freezing of the water in it. The jury found the issues for the plaintiff and assessed her damages at $99.00.

The court instructed the jury in substance that if they be-

lieved from the evidence that the garage was leased as a heated garage and that the same was not sufficiently heated so as to prevent the water in the car from freezing, then appellant was liable to such damages as was sustained by reason of such insufficient heating unless appellee had notice of such insufficient heating and could by the exercises of reasonable care have prevented the damage. By these instructions the court properly left it to the jury to determine what the terms of the leasing were but told them what a contract such as appellee claimed was made meant in law.

The contention of appellant that his contract of leasing should be construed to require him to furnish

heat sufficient only to prevent freezing in ordinary winter weather and not in extremely cold weather is not tenable. Under it he was bound to furnish such heat as was reasonably necessary for the uses to which he knew the garage was to be put, which was to store a car in that was equipped for constant use. The heat necessary for that purpose was such as would be necessary to prevent the water carried in such a car from freezing. **Birtman Co. v. Thompson** 136 Ill. App. 621. If he had desired to limit his liability he should have done so in his contract of leasing.

There is no error in this record and the judgment is affirmed.

Judgment affirmed.

180a

GEN. NO. 6821. OCTOBER TERM A. D. 1917. AG. NO. 52

NATHAN BOND, as Receiver of Hamilton & Cunningham, a Co-partnership, Appellant,

vs.

212 I.A. 671

CHARLES A. ALLEN AND JOHN G. THOMPSON, Appellees,

Appeal from the Circuit Court of Vermilion County.

GRAVES, J.

This is a suit on a note given January 25, 1909, by appellees to Hamilton & Cunningham, a banking co-partnership, for $600, due in four months from date with 7% interest after maturity. The defense is payment, discharge, release, and accord and satisfaction. Appellant sues as receiver of Hamilton & Cunningham. The judgment was for the defendants.

Appellee Thompson was a surety on the note. This the evidence clearly shows and the presumption is that appellant and Hamilton & Cunningham knew it. **Walker v. C. M. & N. R. R. CO.** 277 Ill. 451.

Although this note was originally payable in four months after date no attempt was made to collect it for more than six years. Appellee Allen testified that when the note became due he paid the interest on it for four months more in advance; that when it became due the second time he paid the interest on it for four months more in advance; that when it became due the third time he paid it in full, that all of these payments were made to John L. Hamilton, one of the owners of the owners of the bank. This testimony was not contradicted nor does it appear why if it was not true, that Hamilton was not called

or his deposition taken to deny the payment of these several sums of money. Appellant had ample notice before the trial began, by the affidavits filed in support of the pleas that appellees claimed and would try to prove that this note was paid. Hamilton is shown to have been a member of the firm with whom Allen chiefly did business and with whom all of the business in connection with the payment of this note was transacted, and the fact that his testimony on that subject was not obtained is strongly suggestive that if it had been obtained, it would not contradict Allen. The jury believed the testimony of appellee Allen as they could not well help doing under

the circumstances, and found the issues for the defendants who are the appellees here.

There is further reason why the verdict is right as to appellee Thompson and that is, that as he was surety only, the extention of the note at two different times for periods of four months each without notice to him and without his consent discharges him from liability thereon.

There were no reversible error committed by the Court in his rulings on the admissibility of evidence.

The sixth instruction given for appellees on the question of the burden of proof is not right, and if the evidence was anywhere near equally balanced the error would probably require the reversal of the judgment, but the uncontradicted evidence of the payment of this note is so clear that the verdict must have been for appellees

whatever instructions had been given short of a peremptory instruction for the appellant. Besides that the third and fourth instructions given for appellant so clearly stated the correct rule as to the burden of proof that the jury could scarcely be misled by the incorrect one given.

In his motion for a new trial appellant says he has newly discovered evidence, but the affidavits filed support of that branch of the motion disclose that the newly discovered evidence is that of John L. Hamilton who says he will testify that the note was not paid by Allen. One of the elements necessary to be shown in order to entitle appellant to a new trial on the grounds of newly discovered evidence is entirely wanting in this case and that is diligence in attempting to secure the proofs that are now claimed to be newly discovered. As before suggested as soon as the affidavits in support of the pleas were filed the necessity of having the presence or testimony of the only living man who could contradict such defense, namely Hamilton, must have been at once suggested, yet although sufficient time intervened and his whereabouts were known, no attempt to procure either his presence or his testimony seems to have been made.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

181a

GEN. NO. 6834. OCTOBER TERM A. D. 1917. AG. NO. 61

MARY L. MAYFIELD, Appellee,

vs.

212 I.A. 671

THE ALEXANDER LUMBER COMPANY, a Corporation, Appellant.

Appeal from the Circuit Court of Champaign County.

GRAVES, J.

Appellee obtained a judgment against appellant for $2612.67 in an action of assumpset brought to recover rent due by the terms of a lease under seal and for damages for failure of appellant to keep certain buildings insured according to the term of the lease, which buildings were later destroyed by fire. The declaration contained two special counts and the common counts. No complaint is made in the argument in this court as to the sufficiency of this declaration or any count thereof. To this declaration appellant filed a plea of the general issue and eight special pleas. Amended second, third, eighth and ninth special pleas were then filed. To all of these amended pleas demurrer was sustained. Two additional pleas were filed, a demurrer to which was overruled. Appellants demurrer to appellee's third replication to the first additional plea was overruled.

To take up each of the pleas to which demurrer was sustained and discuss its defects would extend this opinion to an unwarranted length. It is sufficient to say that they were each subject to one or more of the objections made to them and that all proper defenses

attempted to be set up in each of them were provable under the general issue. Such a plea is bad. **Governor v. Lagow** 43 Ill. 135. **Richlieu Hotel Co. v. Int. Military Encampment Co.** 41 Ill. App. 268. Some of them were bad because it was attempted in them to set up want of consideration for the making of the covenants in the lease which was a sealed instrument. **Chicago Sash Manuf. Co. v. Haven** 195 Ill. 474. The demurrer to these pleas was properly sustained.

The replication to the first amended plea the demurrer to which was overruled was in substance that the supposed agreements averred in that plea to have been made subsequent to the making of the lease sued on were oral and not under seal, while the lease was un-

der seal, and that in fact the lease never was changed since it was made nor was any subsequent agreement under seal concerning the matters contained in the lease, ever made. The plea to which that replication was addressed contained an averment that there had been a subsequent agreement between the parties modifying the terms of the lease. The replication was a proper reply to such an averment, and the demurrer to it was properly overruled. A contract under seal cannot be modified by an oral agreement. **Ryan v. Cook** 172 Ill. 302-311-312.

The next error relied on is that appellant was not allowed to cross examine Mrs. Mayfield "as to her conversation regarding the tender of rent after she had testified in chief that no rent had been paid her." Our attention is called to no place in the abstract

or record where the cross examination referred to of Mrs. Mayfield was attempted, and a careful reading of all her evidence as abstracted fails to disclose any such circumstance. We do find that a question was asked of her on cross examination in the following words:—

"Didn't you say to Mr. Tucker at that time, or didn't Mr. Hamilton say, and you say 'That is right' —They don't owe you a cent until we rebuild those buildings."

To which question the objection was interposed that it was not crossexamination, and the objection was sustained, but we have been unable to find anything in her direct examination that the question asked could relate to even if it was intelligible. It is further complained that appellant was not permitted to show what it had done about other quarters after the fire or whether it had done anything about other quarters. It is inconceivable how the testimony sought by such questions could be probative of any issuable fact in this case.

The objections to the giving and refusing of instructions are without merit.

The lease in question was for a term of years beginning July 1, 1910 and to end July 1, 1922 for a monthly cash rental of $60.94. The premises were to be used as a lumber yard. As a part of the consideration appellant agreed to build and did build on the premises certain buildings and was to keep those so built insured for $2000 and was to keep the buildings already there insured for $1,-200. It is not denied that at the time suit was brought there remained unpaid ten months' rent or $609.40, neither is it denied that appellant

failed at all times to keep his covenant to insure the buildings, nor is it denied that the buildings were destroyed by fire and that they were worth at least $2000. The premises belonged to appellee and so did the lease, although the lease was originally made by a trustee for her, the trustee had been discharged and appellant had since that time recognized and dealt with appellee as its landlady and paid her the rent. Appellee clearly had a right to recover her damages from appellant for the breaches of his covenant in the lease. The judgment is not excessive. We find no error in the record and the judgment is affirmed.

Judgment affirmed.

182a

GEN. NO. 6842. OCTOBER TERM A. D. 1917. AG. NO.67

GEORGE F. TORBERT, Appellant,

212 I.A. 671

vs.

ALLEN TUGGLE AND THRUMAN TUGGLE,
Appellees.

Appeal from the Circuit Court of De Witt County

GRAVES, J.

Appellant George F. Torbert and appellee Allen Tuggle own adjoining farm lands. The division line between these lands runs north and south. The lands of Allen Tuggle are operated by him and his son Thruman Tuggle. During the spring of 1913 livestock belonging to appellees came through the fence that runs along the north twenty rods of the division line. This fence had been washed out or had fallen down that spring so that it presented no obstacle to stock crossing the line. The stock of appellees that came upon appellant's premises over that part of the division line did damage to the amount of $9.50 according to the estimate of two of the neighbors whom appellant requested to make the estimate. The damages were not paid, and this suit was begun before a justice of the peace and was appealed to the Circuit Court where on a trial before a jury the issues were found for the defendants, appellees here. The chief controversy before the jury was as to which of the parties was obliged to keep up the fence in question. If it was the duty of appellant to maintain it, and he did not do so, he could not complain if appellees' stock trespassed on his premises by reason

of its defective condition. The evidence on this point was conflicting and the wives of the two appellees were permitted over objection to testify that appellant had at a former trial stated in effect that the fence through which the cattle came was his to maintain. This was manifest error. The wife of a party in interest is incompetent to testify for or against him, except in the specific instances enumerated in the statute where it is provided she may testify. Chap. 51, Sec. 5, R. S. The case at bar does not come under any of the exceptions there enumerated. That is, she may not testify except in those instances, to anything which tends to support or break down the case or defense he is attempting to maintain. It is true a wife of a party to a suit may be allowed to testify in

that suit to facts that in no way effect his rights or interests, if circumstances arise where that can be done and her testimony is otherwise incompetent, but it has never been held by a court of review in this state that under circumstances like those here presented she may testify. The rules applies regardless of who calls the wife as a witness. The thing that deterimnes whether or not she may testify is will her testimony affect the interest of her husband? In this case appellees were jointly interested in establishing the fact that the part of the fence through which their stock went upon the premises of appellant was to be maintained by him, and the testimony of their wives tended to show that such was the case. It was very likely their testimony that caused the jury to return the

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verdict they did. They were incompetent witnesses and they should not have been allowed to testify. **Schreffler v. Chase** 243 Ill. 395, **Fern v. Postlethwait** 24 Ill. 626. **Thomas v. Anthony** 261 Ill. 288.

Other errors have been argued but as the same errors are not likely to occur again, it is not worth while to discuss them. For the reason given the judgment is reversed and the cause is remanded.

Reversed and remanded.

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that suit to fruit; but [illegible]
[illegible]
and her [illegible]
never [illegible]
[illegible]
[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Reversed and remanded.

183a

GEN. NO. 6859. APRIL TERM A. D. 1918. AG. NO. 12.

THE SHILOH MUTUAL TELEPHONE CO.
Defendant in Error

vs.

212 I.A. 671

CHARLES C. CREAMER, Plaintiff in Error.

Error to the Circuit Court of Schuyler County.

GRAVES, J.

Defendant in error is, as its name indicates, a mutual telephone company. At first only stockholders were allowed to attach their telephones to its wire. At that time plaintiff in error owned one share of stock, and his brother Earl Creamer owned two shares. Plaintiff in error as the owner of one share had a telephone in his residence attached to the wires of the company, and Earl Creamer as the owner of two shares had one telephone in his own residence and one in his mother's residence attached to the wires. Later Earl Creamer sold his interest in the farm and moved away, and it is contended that plaintiff in error bought the share of stock on the strength of which his mother's telephone was connected up with the company's system, although about that there seems to be some doubt. Later on the telephone company decided to allow parties who were not stockholders to have telephones connected with its wires and from year to year rates were fixed by the company at which stockholders as well as others could have the use of the wires of the company. In all cases the telephone themselves were furnished by the subscribers. The charge was made for the right to connect telephones with the wires

and for the use of the wires. In 1905 the rate was $5.00 for each telephone connected and plaintiff in error who had theretofore paid and to whom the company looked for pay for the use of the wires connecting his own and his mother's telephone with the wires of the company, refused to pay the bill, and both his and his mother's telephone were disconnected. Later he went to the company, paid the bill and asked to have both telephone re-connected, which the company did. The company dealt with plaintiff in error, kept the account in his name, looked to him for its pay and knew no one else in the transaction. Later plaintiff in error moved into the house with his mother and put a tenant into possession of the house he had

formerly occupied, but still for years paid the charges on both telephones. He had the call formerly used for his own home telephone transferred to the telephone in his mother's home. Eventually the tenant paid the charges on the telephone at the former residence of plaintiff in error, and he paid only for the one at his new residence. The rental fee for the use of the wires was fixed at $7.00 per connection for the year 1916. This was not paid by defendant in error. The company sued him before a justice of the peace where judgment was rendered for plaintiff in error. The case was appealed to the Circuit Court. After that appeal was taken plaintiff in error went to the home of the secretary of the company and gave him $7.00 saying it was for his mother's rent. The secretary without consulting his books took the money and gave to plaintiff in error a receipt in the name of

his mother in accordance with the request. Nothing was said about it being a payment of the account sued on or about it being in settlement of the suit, and no costs were paid or tendered at that time. The secretary did not know that plaintiff in error and his mother lived in the same house and did not know that the mother was not a renter. When he went to his books to give credit to the mother he found no account with her and no record of her being a renter, and sent the money back to plaintiff in error, but it was refused by him. At the trail in the Circuit Court plaintiff in error claimed that the debt was his mother's and that she had paid it after the suit was commenced. The jury found the issues for the company, and judgment was entered against plaintiff in error for $7.00 and costs of suit. The weight of the evidence strongly tends to show that the debt was that of plaintiff in error and not that of his mother, and that the payment by him of $7.00 to the secretary of the company, in his mother's name, was a mere subterfuge to avoid a judgment being entered against him for the costs incidental to the ligatation. If plaintiff in error had said to the secretary when he handed him the $7.00 "the claim you have sued me on is really against my mother and not against me, and she has sent this money to pay it," and the secretary had then accepted it, the situation would have been relived to an extent at least of the appearance of a trick. The verdict was clearly in accord with the weight of the evidence.

It is said that the first instruction is bad because it is mandatory and omits every matter set up by plaintiff in error as a defense. The point is not well taken. The instruction is not mandatory. The second and third instructions do not assume facts not proven as claimed by plaintiff in error. The claim that the books offered in evidence were erroneously admitted because they are not books of account is also unfounded. They were not offered as books of account but to show a course of dealing.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

184a

GEN. NO. 6865. APRIL TERM A. D. 1918. AG NO. 18.

FRED W. AYERS, Appellant,

vs.

212 I.A. 671

THE WABASH COAL COMPANY, Appellee.

Appeal from the Circuit Court of Adams County.

GRAVES, J.

Appellant brought this suit to recover from appellee for the breach of a contract whereby appellant claimed he had agreed to furnish to appellee and appellee had agreed to take from him, water for use in its steam boiler for a year at the rate of $40 per month, and that appellee refused to take and pay for the water according to contract. Appellee says there was a contract to furnish water at $40 per month so long as it took the water, but that there was no agreement as to how long it would do so; that either party had the right to discontinue the preformance of the contract at any time; that it had exercised its rights and option to discontinue to take water of appellant and had paid for all the water it had used at the stipulated price. There is no claim by appellant that appelle has not paid for the water the full time it used it, but he does contend that it should have continued to use and pay for it at least to to the end of the year in which it began to take it. Upon the trial of the case in the Circuit Court appellant was unsuccessful and judgment was entered against him. He bases his claim that this judgment should be reversed on the ground that the verdict is contrary to the weight of the evidence and that the court erred in giving and refusing instructions.

The burden of proving the contract to be claimed by him was on him. He gave his version of it on the stand, and the agent of appellee gave his version of it. Their stories were in conflict. Appellant claims he was corroborated by inferences from circumstances in evidence. Among these circumstances are the following:—that appellant had gone to considerable expense to pipe the water to appellee's mine; that appellee had taken the water for the greater part of two years and had settled for it at the end of each year. On the other hand, the circumstance that appellee had not used the water all of one of the years, and when settlement was made for that year a deduction was made for the time it was not used, tends to support the theory of appellee. The jury heard all of the evidence, saw the witnesses and heard them

testify. It is their special province and duty to weigh the evidence and determine the credibility of witnesses, and they can do so better than this court can do from reading the record. A court of review will not substitute its opinions on what the evidence shows for that of the jury, unless as a matter of first impression or as Justice Breese once said "first blush" the verdict is manifestly contrary to the weight of the evidence. In this case that condition does not exist, and we do not feel warranted in disturbing the verdict, for that reason.

Appellants refused instruction No. 12 fails to limit the jury to the evidence as a basis of their findings. It is misleading and

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the conclusion the jury are told follows from the premise stated does not necessarily follow.

Appellant's refused instruction No. 14 is on the subject of the allowance of interest in case of unreasonable and vexatious delay. No case was made either by the pleadings or the proof warranting the recovery of interest because of unreasonable and vexatious delay.

Appellant's refused instruction No. 15 directs a verdict and ignores the defense of appellee set out in his tenth given instruction; namely, that at the end of the first year appellant terminated the contract by turning off the water and refusing to furnish any more unless a contract in writing was made, obligating appellee to take it for five years. It is further bad because it leoves it to the jury to determine the meaning of the allegations in the declaration. There was no error in refusing the instruction complained of.

Appellee's given instruction No. 8 and No. 10 are clearly right and are not subject to the construction and criticism made of them by appellant.

The objection urged against appellee's given instruction No. 7 is that it tells the jury that under the conditions mentioned the defendant might terminate a contract **at any time,** when even under the claim made by appellee it could only be terminated at the end of the month. There was no claim made in the case that the contract might be terminated at any time except at the end of the month, and

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even if the instruction could be construed to mean what appellant claims, the error would be harmless. Some other objections might have been made to this instruction, but as they were not made it is not for us to raise them.

The judgment of the Circuit Court is affirmed.

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185a

GEN. NO. 6868. APRIL TERM A. D. 1918. AG. NO. 21.

WILLIAM H. WEBSTER, Plaintiff in Error

vs.

212 I.A. 672

L. H. COLEMAN Et Al, Defendant in Error

Error to the Circuit Court of Sangamon County.

GRAVES, J.

The sole question in this case is whether, after lands have been sold at a foreclosure sale and one year has passed without the same having been redeemed by the owner, and a judgment creditor has then redeemed it, and it has been sold at redemption sale within fifteen months after the sale on the foreclosure decree for an amount not exceeding the redemption money paid, and a deed has issued to the purchaser at such redemption sale, a creditor who thereafter obtains his judgment within fifteen months from the foreclosure sale can redeem from the redemption sale? This question is answered in the negative by section 22 of Chapter 77 R. S. and by the Supreme Court in **Meier v. Hilton** 257 Ill. 174-180. The section referred to provides that, if at a creditor's redemption sale no greater amount is bid than the redemption money paid with interest and costs

"The premises shall be struck off to the person making such redemption, and the officer shall forthwith execute a deed of the premises to him and **no other redemption shall be allowed.**"

and the Supreme Court in the case cited said with regard to a redemption sale

"If the property will not, on the sale where everybody may bid, bring more than it did at the former sale, it shall not be subject to further redemption but shall be if it brings more."

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Plaintiff in error filed his bill in this case setting up a state of facts identical with those above stated. A demurrer to that bill was sustained and the bill was dismissed for want of equity. There was no error committed in so doing, and the decree is affirmed.

Decree affirmed.

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186a

GEN. NO. 6882. APRIL TERM A. D. 1918. AG. NO. 33.

DARLING & COMPANY, A Corporation, Appellant

vs.

WRIGHT & SHARP, A Corporation, Appellee.

212 I.A. 672

Appeal from the County Court of Sangamon County.

GRAVES, J.

Both parties to this case are Illinois corporations. Appellants office and place of business was in Chicago. Appellee was located at Springfield. Appellee came into existence under that name in 1909 when an old corporation by the name of "Wright Stock Food Company" was re-organized and took on additional corporate powers under the new name of Wright & Sharp. T. E. Sharp was an officer and one of the directors in both the old and the new corporation and took a large part in the management of the business, and made contracts for and in the name of the corporation. On March 27, 1913 the following contract in writing was signed by all the stockholders of Wright & Sharp, Incorporated.

"An agreement entered into this, the 27th day of March, 1913, between G. W. Constant and T. E. Sharp. G. W. Constant agrees to grant T. E. Sharp an option of one year from the date upon the stock of Wright & Sharp (Incorporated) now owned by him also that held by Mrs. Galen Ritchey and J. D. Constant, upon the following conditions:—

T. E. Sharp agrees to pay off certain notes given by Wright & Sharp (Incorporated) to the amount of three thousand dollars ($3000.00) per annum, less amount paid as interest upon notes now held by G. W. Constant.

G. W. Constant agrees that he will extend this option one year from the expiration of this contract provided payments have been made as agreed upon above.

G. W. Constant further agrees that if T. E. Sharp has fulfilled above agreement that he will then sell to said T. E. Sharp the fifty-two shares of stock of Wright & Sharp (Incorporated) owned by himself, Mrs. Galen Ritchey and J. D. Constant and to release notes amounting to $17,000.00 held by G. W. Constant against said Wright & Sharp (Incorporated) in consideration of $17,000.00 less amount paid upon same prior

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to the closing of this option. G. W. Constant agrees to accept the note of T. E. Sharp for the purchase price provided ample security is given.

Furthermore T. E. Sharp agrees that from date of this instrument he will permit no further indebtedness to accrue against the firm of Wright & Sharp (Incorporated.)

G. W. Constant further agrees that if at the end of two years T. E. Sharp has made payments as agreed upon and G. W. Constant does not wish to renew this option that he will allow T. E. Sharp $1500.00 for salary as manager of the plant, during this time.

Further, T. E. Sharp agrees that during the exis-

tence of the option herein granted, he will at the end of each three months, furnish a true statement to G. W. Constant of all items of receipt and expenditures made by and on behalf of said corporation.

Witness our hands and seals this date above written.

(Signed) G. W. Constant,
(Signed) T. E. Sharp,
(Signed) Mrs. Galen Ritchey,
(Signed) J. D. Constant."

Following the making of this contract T. E. Sharp was left in practically exclusive charge of the office, plant, machinery, wagons, horses, books, papers and stationery of the corporation, and continued to transact the same business as before in the same way, at the same place, by the same means, on the same stationery, by the same agency and with more or less of the same people. All of this was with the full knowledge of and without objection from the officers and directors of appellee.

Appellant Darling & Company began doing business with appellee in 1909 about the time of the reorganization of the corporation and had continued to do business with it more or less regularly up to and

including 1914,

and had from time to time, made advances to appellee of money on goods purchased of it. On November 9, 1914, T. E. Sharp went to the office of appellant in Chicago, where and when a contract was entered into between appellant and Sharp, in the name of appellee, which culminated in the drawing by the manager of appellant of a memorandum of purchase by it, and sale by appellee, of all of the out-put of appellee's plant for the months of November and December, 1914, and January and February, 1915. This memorandum was delivered to T. E. Sharp by the manager of appellant, and he took it with him and later returned it to appellant from Springfield signed "Wright & Sharp, "T. E. Sharp." This memorandum was as follows:—

"Springfield, Illinois, November 9th, 1914.

"We, Wright & Sharp, for and in consideration of the advance of two thousand dollars ($2000.00) the receipt of which is hereby acknowledged, do hereby agree to consign to Darling & Company, Union Stock Yards, Chicago, Illinois, to be remitted for at market value, our entire production of Tallow, Grease, Tankage, Bones and Cracklings, for the months of November and December nineteen hundred and fourteen (1914) and January and February nineteen hundred and fifteen (1915) consisting of from one hundred and forty (140) to one hundred and sixty (160) Tierces of Tallow and Grease and four (4) carloads of Tankage and Bones. This advance of two thousand dollars ($2000.00) to apply in part payment of same, the estimated value of which is twenty-five hundred dollars ($2500.00) to three thousand dollars ($3000.00.)

It is further agreed that should the entire value of our shipment of Tallow, Tankage, Grease and Bones not equal the amount of two thousand dollars ($2000.00) advanced, we will promptly honor draft drawn by Darling & Company for the difference. We also agree to pay Darling & Company seven per cent (7%) interest per annum on the advance of two thousand dollars ($2000.00) It is also agreed that we will keep our plant insured against fire for the sum of six thousand dollars ($6000.00) and in the event our plant should be destroyed by fire during the life of this contract, we will take care of any claims and pay any portion of the two thousand dollars ($2000.00) received as an advance, from money received for insurance.

We also agree to consign to Darling & Company, Union Stock Yards, Chicago, Illinois, our production of Hides and Skins, to be remitted for at market value, for the months of November and December nineteen hundred and fourteen (1914) and January and February nineteen hundred and fifteen (1915.) Each shipment of Hides and Skins to be paid for either by check or draft as shipments are made. Shipment of Tallow, Tankage and Bones to be made every thirty (30) days. Shipments of Hides and Skins to be made every fifteen (15) or thirty (30) days.

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(Signed) Wright & Sharp,
T. E. Sharp."

When this memoradum was returned to appellant it was accompanied by a sight draft for $2000 signed "Wright & Sharp, per T. E. Sharp", which appellant honored and paid. Advance payments had before that time been made by appellant to appellee on shipments to be made. Shipments of the goods purchased were made in the name of Wright & Sharp to appellant until all but $977.97 of the $2000 advance had been paid. With the account in that condition, the business theretofore run in the name of Wright & Sharp ceased to be conducted. Up to that time appellant had no knowledge or notice of any change in the ownership or control of the business of appellee since its organization in 1909, or of the making of the writing of March 27, 1913, above quoted. Indeed it does not appear that anyone besides the officers and directors had notice of any change, if any change was ever made.

There is some testimony tending to show that the writing of March 27, 1913 was considered by the parties to be a lease. There is also some testimony tending to show that a separate leasing of the plant and other property of appellee to T. E. Sharp was at one time entered into, but in the view we take of this case, it is immaterial whether there was a lease or what the writing was or was intended to be, because it was in fact a secret agreement of which appellant had no notice or knowledge, and which in no way affected its rights.

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Appellant having theretofore dealt with appellee at various times through T. E. Sharp as its authorized representative and agent in transactions of the same character as the one involved, which dealings were ratified, approved and performed by appellee, had a right to assume that Sharp was the authorized agent of appellee. One dealing in good faith with a person who is acting within the scope of his apparent authority and without notice of facts showing that the acts are unauthorized, may hold the principal liable whether the acts were in fact authorized or not. **McDonald Et Al v. Chisholm** 131 Ill. 273. By holding out an agent to the public as one having authority to exercise the powers assumed, a corporation is bound to the extent of the agent's apparent authority. **Alton Mfg. Co. v. Biblical Institute** 243 Ill. 298.

The proof shows that $620 of the $2000 secured from appellant on the sightdraft drawn in connection with the sale of the output of the plant of Wright & Sharp was paid by Sharp to G. W. Constant on an obligation he held against Wright & Sharp, incorporated, in that way the corporation received the benefit of that much of the money. This money they have not returned. When a corporation receives the use and benefit of money obtained in an unauthorized transaction, and keeps it after notice of the manner in which it was obtained, the corporation is bound as fully as if the transaction was authorized. **Alton Mfg. Co. v. Biblical Institute** 243 Ill. 298, **First Natl. Bank v. Osborne** 121 Ill. 25.

Appellant brought suit against appellee to recover $977.97 the balance of the amount of the sight draft after the amount in value of the output of appellee's plant had been credited on it. A jury was waived in the trial court. The court found the issues for appellee and entered judgmnet against appellant in bar of his action and for costs. That finding was manifestly against the weight of the evidence, and the judgment based thereon is therefore reversed. The waiver of a jury trial in the county court coupled with the fact that appellee was not prevented from introducing all competent evidence offered by him, confers upon this court the right to enter here whatever judgment is found to be warranted by the evidence. It is therefore unnecessary to remand this case to the county court for another trial.

We find as ulitmate facts that the contract sued on is a valid contract and is binding on appellee; that appel-

lee has failed to perform that contract: and that appellant has been damaged to the amount of $977.97, because of the failures of appellee to perform the contract. Judgment is therefore entered here in favor of appellant and against appellee for $977.97 and for all costs in this and the county court.

Reversed, Judgment here.

187a

GEN. NO. 6684. ~~OCTOBER~~ April TERM A. D. 1917. AG. NO. 1

S. EMMA POLSON, by Ingra J. Miller, her next friend, Plaintiff in Error,

212 I.A. 672

vs.

C. B. WIGGINS, Defendant in Error.

~~Appeal from~~ Error to the County Court of Champaign County

GRAVES, J.

Defendant in error obtained a judgment against one Benjamin Polson and caused an execution issued thereon to be levied on two mares that were found in his possession as his property. Plaintiff in error, the mother of Benjamin Polson the judgment debtor, through her daughter Mrs. Miller, acting as her next friend, instituted a proceeding in the County Court of Champaign County, for the trial of the right of property. The case was tried by the Court, a trial by jury being waived. The court found the issues against the claimant and entered judgment accordingly. To reverse that judgment plaintiff in error has sued out this writ of error.

Neither the claimant or her son Benjamin, the judgment debtor, were called as witnesses. The evidence of Charles Polson, the son of claimant and brother of Benjamin was offered on the part of the claimant. He testified that he had purchased one of these mares and the mother of the other one, of a person named Rankin at a sale, that he had given his note for them with his mother, the claimant as surety, that he had afterward sold them to his mother who had paid the note and paid him about a hundred dollars besides for them.

There was also testimony offered tending to show that Benjamin Polson at one time said one of the horses belonged to his mother, and he could not sell it without consulting her. On the other hand the testimony of other witnesses who apparently were disinterested very strongly tended to show that Benjamin Polson himself paid the note; that he had had possession of the horses in question for a long time; had treated them as his own, exercised acts of ownership over them, scheduled them as his for assessment and had declared them to be his property at various times and places and to various persons. The testimony of the witness Charles Polson was discredited by showing that he had at another time said the horses which he stated on the stand were his mothers, belonged to his

sister Mrs. Ingra J. Miller, and the testimony of the witness Ingra J. Miller was discredited by the fact that after this same property was taken under this same execution she instituted a suit for the trial of the right of property, claiming it as her own and only after the court had found the issues against her did she begin this suit as the next friend of her mother. The finding of the court that the horses were the property of Benjamin and not the property of the claimant was amply justified by competent evidence.

The claim that incompetent evidence was offered and admitted on behalf of the defendant is not worthy of extended discussion here, because it will be presumed that only competent evidence was considered by the court and therefore any error in admitting incompetent

evidence was harmless.

Plaintiff in error in rebuttal asked the witness M. S. Rankin what his opinion was as to whether the claimant was "capable of transacting her business affairs." To this question objection was made in the following words:

"Objected to. In the first place it is not proper rebuttal evidence. In the second place it is at this time immaterial, irrelevant and incompetent, and third, because no sufficient foundation has been laid for the basis of forming such an opinion."

The entire testimony of the witness, given as a basis for expressing an opinion on the matter in question as abstracted is as follows:—

"I have known S. Emma Polson since 1873 or 1874. Have had conversations with her. Met her in a friendly way. When she was young she used to come to the store to trade with us. Later she was married and moved to the farm, and once in a while I would meet her. Have seen her here to-day. Have not seen her for two or three years, something like that, previous to to-day, except that I saw her here at the Court the other day about a week ago."

Each point made in the objection was well taken and the objection was properly sustained.

A check marked "Exhibit B" was offered in evidence for the purpose, as declared by claimant's attorney in the abstract of record, of showing that the witness Rankin had been "paid off in cash about the first of July" and on objection, it was excluded. There was no error in that ruling. It was not material to any issue being tried whether the payment to Rankin was in cash or when or where he was paid.

The judgment of the County Court is affirmed.

In view of the affirmation of the judgment of the County Court it is not necessary to decide the motion that was taken with the case to strike the bill of exceptions from the files.

Judgment affirmed.

185a

GEN. NO. 6885. APRIL TERM A. D. 1918. AG. NO. 36.

THE PEOPLE, Etc., Appellees,

vs.

212 I.A. 672

JAMES C. NORMAN, ET AL, (BEE KING)
Appellant.

Appeal from the Circuit Court of McLean County.

GRAVES, J.

A bill in chancery was filed in the Circuit Court of McLean County charging appellant Bee King with creating and conducting a public nuisance in that county by maintaining premises occupied by her for the purpose of lewdness, assignation and prostitution, and by keeping there a number of lewd, immoral and depraved women for the purpose of prostitution, fornecation and lewdness in violation of law. Appellant did not answer the bill and was defaulted. On a hearing upon the bill the court found the charge to be true and perpetually enjoined appellant from maintaining any such nuisance within the jurisdiction of the court. Later appellant was brought before the court on the charge of contempt for having violated the terms of the injunction. She was found guilty and sentenced to the county jail for 90 days. The errors assigned and argued are that the evidence does not warrant the finding, and that improper evidence was heard by the Court.

A proceeding for the punishment of a person for contempt in violating the terms of an injunction committed out of the presence of the court is a civil and not a criminal proceeding, and the rules

of evidence applicable to civil cases control in proceedings of this character. **Flannery v. The People** 225 Ill. 62. It is not denied that if appellant at the time she was cited for contempt was in fact maintaining in McLean County, a place, where assignation, prostitution, licentiousness and lewdness were practiced, she was violating the injunction. A reading of this record shows beyond all reasonable doubt that she was at that time maintaining just that sort of place. It shows that she occupied the second and third floors of a certain building in Bloomington in which there ten or more rooms fitted with beds; that she had there with her girls of unsavory reputations and gaudy dress; that men callers, among them many soldiers encamped near there. came and went at all times of the night, on foot and in

cabs, singly and in pairs, by the front stairs and the back stairs, by the street and by the alley, sometimes accompanied by women and sometimes not; that some went there boldly and some sneaked there after passing back and forth by the place until no one was in sight; that the calls of men varied in length from thirty minutes or less to hours; that beer was delivered there at various times; that as late as one or two o'clock in the morning men and women were heard to make loud and tumultuous noises and to use profane and obscene language; that men were wont to call at adjacent houses in the night and ask for Bee King, and if the party answering the call had any girls; that the officers went there one night and found two men and one woman in one of the rooms, one of the men

was in his underwear, and appellant testified that the woman was fixing her hair preparatory to leaving for Springfield. No other explanation of her presence in the room with the men was given; and that other girls were in rooms that were not entered by the officers. The circumstances disclosed in this record unerringly point to the disorderly character of the house. No other conclusion can be drawn from it. Better proof that the place was a disorderly house could scarcely be made unless an eyewitness of or a participant in acts of **flagrante delicto** there should testify to the same.

No specific question and answer of any witness has been called to our attention to which objection was made in the trial court, that is now claimed was not proper or competent. Error cannot be assigned here for matters upon which the trial court has not ruled. Besides that the hearing was before the court without a jury, and the presumption is that the court considered only proper evidence.

There is no reversible error in this record and the judgment is affirmed.

Judgment affirmed.

181a

GEN. NO. 6892. APRIL TERM A. D. 1918. AG. NO. 42.

GEORGIA R. MONTGOMERY, Appellee

vs.

212 I.A. 672

THE CHICAGO & ALTON R. R. CO., Appellant

Appeal from the Circuit Court of Morgan County.

GRAVES, J.

This is an appeal by defendant from a judgment for $3000 in a personal injury suit brought by plaintiff to recover damages for injuries claimed to have resulted to her from a fall in the night time at the entrance of the passenger station in the city of Jacksonville. The negligence charged against appellant is in failing to keep the station and the entrance thereto properly lighted. As this case must be reversed for several errors to be noticed later, we will refrain from expressing any opinion on the weight of the evidence beyond saying that there was enough in the record to warrant the court in refusing to give the peremptory instruction presented by defendant under the rule laid down in **Libby, McNeil & Libby v. Cook** 222 Ill. 206.

The law is well settled that statements or declarations of persons that they are suffering pain or have suffered pain, when not made to a physician or medical expert for the purpose of enabling him to form an opinion with a view to treatment, are not admissable in evidence in her behalf in a suit to recover damages from the one who is charged with having been responsible for the injuries supposed

to have caused the pain, unless such statements were made at the time of the injury or so soon thereafter as to be part of the resgestae. **West Chicago St. Ry. Co. v. Kennelly** 170 Ill. 508. **Lake St. El. Ry. Co. v. Shaw** 205 Ill 39. **Shaughnessy v. Holt** 236 Ill. 485. In violation of that rule the court, over objections of appellant's counsel, permitted the witness Hopper to testify to complaints made by appellee long enough after the accident so that she had gone from the place of the accident into the men's waiting room in the station and had there been seated. The witness Wilson was allowed to testify to a conversation had with appellee after she had entered the depot in which she told him that she fell and hurt herself and complained that her ankle hurt. The witness Happ was allowed to testify that appellee complained to him in Chicago of

pains in her ankle, foot, side and back. The witness Montgomery was allowed to testify that appellee complained to him in Chicago on the morning after the accident of her foot and of pain in her back, and the witness Kemeys-Tynte was allowed to tell on the stand of complaints made by appellee to her in Lake Mills, Wisconsin, of her side hurting badly. None of these conversations were enough in time to the accident to be part of the **res gestae.** The admission of that testimony was error.

Dr. Bowe, who was appellee's home physician expressed his opinion over objection of appellant, as to what the cause of the condition he found her in was. That was error. What the cause of

appellee's condition was a question for the jury, not for the witness. **Kimborough v. C. C. Ry. Co.** 272 Ill. 71, **Schlauder v. Chicago Southern Traction System** 253 Ill. 154. **City of Chicago v. Deiler** 227 Ill. 571.

The argument of the attorney for appellee to the jury was highly objectionable, and tended to inflame and predudice the jury. Such arguments have been repeatedly condemmed by both the appellate and supreme courts of this state. The second instruction left to the jury to determine whether or not it was the duty of the railroad to use ordinary care to keep its station house reasonably lighted. That was erroneous. What the duty of appellant railroad was is as a matter of law for the court.

For the reasons given the judgment is reversed and the cause is remanded.

Reversed and remanded.

190a

GEN. NO. 6898. APRIL TERM A. D. 1918. AG. NO. 48.

JOHN WESLEY CORMAN, Appellee

vs.

212 I.A. 673

ADELINE STRONG Et Al, Appellants

Appeal from the Circuit Court of Schuyler County.

GRAVES, J.

This is an appeal from an order of the Circuit Court in a partition case, in which the complainant was allowed $900 for his solicitor's fees. The order was entered as a part of the decree for the sale of the premises, but no part of that decree is challenged except the order allowing solicitor's fees. Appellant contend that on the record in this case no attorney's fees could be properly allowed to complainant, because the interest of the parties were not properly set up; because the attorney employed by appellee held a mortgage on the premises involved; because a good and substantial defense was interposed by some of the defendants; because there was no sufficient evidence on which to base a finding of the amount that was proper to be allowed, and because solicitor's fees should not be allowed until after the sale of the premises.

The contentions that the rights of the parties were not properly set out in the bill and that a good and substantial defense to the bill was interposed are not open for our consideration on this so-called record, because the court in its decree expressly finds to the contrary as to both of these contentions. The language of the decree in that respect is:—

"that the rights of the parties in interest are properly

set forth in the bill and supplemental bill herein and that no good and substantial defense was interposed to the said bill and supplemental bill by any or either of the defendants thereto."

The supplemental bill referred to in the foregoing quotation is a bill made necessary by the death of one of the parties after the original bill was filed ,in which the kinship of the deceased tenant in common is set forth.

No error is assigned or direct complaint made as to the correctnes of that part of the dercee just quoted, and if there had been, there is nohting shown in the abstract from which it can be determined whether those findings are right or wrong. The evidence on which that finding in the decree is based is not abstracted.

The rule is well settled both in the Appellate and Supreme Courts that the record will not be searched by the Court to find reasons to reserve a judgment; that if such reasons exist they must be shown in the abstract or they will not be considered.,

The fact that an attorney has a mortgage on lands has never been held in this state to be a reason why he should not be employed by a joint tenant to file a bill of partition. If he may be properly employed to file such a bill, and in the bill the rights of the parties are properly set out and no substantial defense is made by any one, no reason appears and none has been suggested, neither has any authority been cited showing why the party employing such attorney may not have his expenses in paying such attorney apportioned to the owners of the land involved according to their respective interests therein. That is what was done in this case and no error was

committed in so doing.

The fact that the solicitor's fees were fixed before the sale of the premises is no reason why the decree should be reversed at the instance of a defendant. If in looking after the sale and decree approving it and the order of distribution, the attorney earns more fees than has been allowed to the complainant for his attorney's fees, it is complainant's loss, for under some circumstances he might be called upon by his attorney to make good the deficiency, but it is inconceivable how a defendant could be prejudiced in the matter.

The evidence on which the amount of the fee was fixed tended to show that $900 was a reasonable fee for the services rendered, and that it was the usual customary price charged and paid in that county for like services where such fees were fixed by contract, and the court so found. There was ample evidence to warrant the allowance of $900 for solicitor's fees.

The decree of the Circuit Court is affirmed.

Decree affirmed.

1919.

GEN. NO. 6906. APRIL TERM A. D. 1918. AG. NO. 54.

FRANK N. HAYSLIP AND CHILTON H. DAY,
Partners, Etc., Appellees,

vs.

212 I.A. 673

THE C. & A. R. R. CO., Appellant.

Appeal from the Circuit Court of Logan County.

GRAVES, J.

Appellees purchased a stock of general merchandise located at Broadwell, Illinois, for which they gave $2900. They conducted a sacrifice sale at Broadwell for a short time and sold about $1500 worth of these goods, during which time they added to the stock goods to the value of $100 to $125. The balance of the stock was loaded into a car for shipment to Waverly, Illinois. No rate was made on the shipment either as a carload lot or as local freight, neither was it classified as to kind of freight. In the bill of lading made out by the agent of appellant at Broadwell appears a description of the goods shipped.

No. Packages.	Description of articles and Special Marks	Weight Sub. to cor.
One car Gen'l Mdse. viz S. L. & C.		
Lot	Dry Goods	2000lbs
Lot	Shoes	300
Lot	Grocs.	1300
Lot	Show cases	300
Lot	Store Fixtures	4100
Lot	Flour	1800
Lot	Paint	2000
Lot	Hardware	5870
Lot	Grocs.	6600
Lot	Glass Jars	1200

After the car was loaded and sealed and the bill of lading had been made and a copy given to appellee, the car was moved a few hundred feet on a side track but was never started out of town on its way to its destination. It was loaded on May 17, 1917 and on May 18,

1917 about ten o'clock in the forenoon the car was found to be on fire on the inside. The goods were entirely destroyed. Appellees sued appellant for the loss and recovered a judgment of $2250.

The theory of appellees is that appellant had accepted the goods as a common carrier for transportation and was an insurer of the safe delivery of the same

at the named destination as against all loss except that caused by the act of God or the public enemy. Appellant does not deny the general proposition of law on which appellees rely but insists that appellees undertook by deceit and the suppression of the truth to secure the transportation of the goods destroyed at a rate lower than is prescribed by law and the tariffs of appellant railroad company; that they shipped skyrockets, ether, benzine, Roman candles, fire crackers and phosphorous compounds, turpentine and similar articles as and under the classification of groceries and failed to disclose to appellant their true character.

The law is that a shipper owes to a carrier the utmost good faith to truthfully disclose to the carrier the nature and value of goods to be transported, and when the shipper fails in this duty, with intent to avoid the payment of a freight rate commensurate with the character of the goods shipped, he cannot recover from the carrier for the goods if lost, except on proof of loss resulting from negligence on the part of the carrier. **Penn. Co. v. Kenwood Bridge Co.** 170 Ill. 645-648. **C. & A. R. R. Co. v. Shea** 66 Ill. 471. Section 39 of Chapter 111a R. S. commonly known as the Public Utilities act makes it unlawful for any

person to obtain or seek to obtain any service etc. at less than the rate or charge then established and in force, and section 77 of the same act provides a severe penalty for a violation of the provisions of the act.

The record sufficiently discloses that there was in the stock of goods as purchased by appellees all of the combustible and inflammable articles mentioned and some besides, including gunpowder, and that in the list given or statement made by appellees to the agent of the goods loaded none of such articles were enumerated. There is also unquestioned proof that some of such articles were in fact loaded into the car. It is a matter of common knowledge and the proof tends to show, that the freight rate on goods of that character is higher than on less inflammable articles. The law does not distinguish between large and small shipments in its prohibition against securing or attempting to secure discriminating rates or service. Nor is it material whether the discrimination is secured or only attempted, the offense is complete in either case. What the evidence on another trial may show as to what goods were

actually loaded in the car is only conjecture, but there is enough in this record to strongly tend to show a violation of the Public Utilities Act, and a failure on the part of appellees to truthfully and fairly disclose to appellant the character of the goods loaded in the car for shipment. Many exceptions are taken to the rulings of the court on the admission of evidence. To notice each point made is impossible if this opinion is to

be kept in length within the limits of reason. A few only of these instances will be noticed. One of appellees, Frank N. Hayslip, when on the stand was allowed to express his judgment as to the fair cash market value of the stock of groceries, the stock of dry goods, the stock of boots and shoes, and the stock of paints and oils that was loaded into the car, without laying any foundation for such testimony by showing that he knew what these seperate stocks of goods consisted of or in what condition the same were in or what the fair cash market value of the same was. That was error. No witness should have been allowed to express an opinion until he had shown that he knew what he was testifying about. A like objection was made to the testimony of the witness Eisminger. He showed more knowledge as to the quantity, kind and value of the goods than did Hayslip, yet in some instances his opinions were worthless for lack of proper foundation. Appellant offered to prove it had at its office in Broadwell printed rules and regulations for the government of its agents in regard to the acceptance of freight for shipment, that contained explosives and dangerous articles, but upon objection the evidence was excluded. The evidence was competent on appellant's theory of the case that knowledge of the contents of the car would have caused the servants of the road to so handle and care for the same as to have avoided its destruction by fire. Appellant was prohibited from showing that at least part of the paint destroyed was old, dried up and valueless. The testimony was proper on the measure of damage

and should have been admitted. For the purpose of showing that the fire that destroyed the goods was the result of spontaneous combustion appellant offered to prove by competent witnesses what cause will produce spontaneous combustion in goods contained in closed cars and how long it would take to result. Under some phrases of the case it was important to know whether

the fire resulted from the negligence of appellant's servants or other causes. This evidence should have been admitted on that issue. It was refused. This was error. In the argument of the case to the jury the attorney for appellee made inflammatory and improper remarks that tended to prejudice the jury. We doubt if these remarks were such as in themselves would cause the reversal of the judgment, but they certainly should not have been made and a repetition of like remarks should be avoided in the next trial.

Appellant presented to the court and asked the court to give twenty-two instructions. Of these the court gave five and refused to give seventeen. It was not error to refuse these instructions. The substance of all the correct propositions found in the refused instructions are contained in the instructions given.

The judgment of the Circuit Court is reversed and the cause is remanded to that Court.

Reversed and Remanded.

1221

GEN. NO. 6884. APRIL TERM A. D. 1918. AG. NO. 35.

CHARLES W. BINNS, ET ALS, Appellant.

vs.

212 I.A. 673

HENRY JUHL, ET ALS., Appellees.

Appeal from Circuit Court of Logan County.

Opinion by WAGGONER, J.

This is an appeal from an order of the Circuit Court of Logan County refushing to admit to probate the will of Louis Kutzbach, deceased, and rendering judgment against the estate of said decedent for cost to be paid in due course of administration.

The will was duly presented to the County Court of said county, where probate was denied, and an appeal taken by the petitioners to the Circuit Court.

The probating of a will is a statutory proceeding. If the requirements of the statute, in that regard, are complied with, the court should admit a will to record—otherwise not.

The statute provides that "all wills * * * shall be reduced to writing, and signed by the testator ,,* * * and attested in the presence of the testator, * * * by two or more credible witnesses, two of whom shall declare on oath or affirmation ,

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before the county court of the proper county, that they were present and saw the testator * * * sign said will, * * * in their presence, * * * and that they believed the testator * * to be of sound mind and memory at the time of signing * * * the same, shall be sufficient proof of the execution of said will, * * * to admit the same to record: Provided, that no proof of fraud, compulsion or other improper conduct be exhibited, which in the opinion of said county court, shall be deemed sufficient to invalidate or destroy the same. (Hurd's Statute 1917 Chapter 148, Section 2).

There is no evidence of fraud, complusion or other improper conduct in this case, leaving for consideration the question of whether the provisions of the statute, above quoted, have been complied with in order to determine the right to have said will admitted to record.

Harry Koester, a subscribing witness, testified in substance that he was a farmer; that he lived one half a mile from the testator for six years prior to his death, and during that time saw him about every other day,

talked with him and they exchanged farm work; that he was called to the home of Louis Kutzbach to be a witness to his will, and on his arrival there found Herman Buse, Louis Kutzbach, Deitrich Korfhage and J. E. Seary; that J. E. Seary wrote the will, read it over to Louis Kutzbach, who said it was all right—the way he wanted

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it, and then signed the will by mark, the name Louis Kutzbach having been written by J. E. Seary; that the will was signed by me (Harry Koester) and Herman Buse as witnesses in the presence of each other and in the presence of Louis Kutzbach; and that from his observations, acquaintance and knowledge of the man this witness believed Louis Kutzbach to be of sound mind and memory at the time he signed the will.

Herman Buse, the other subscribing witness, testified in substance that he knew Louis Kutzbach in his lifetime, lived about three quarters of a mile from him for about twenty-five years; that he came in contact with Louis Kutzbach every once in a while the way neighbors come in; that we helped each other through threshing, corn shelling and exchanged work; that we helped each other last summer threshing; there was present in the room when the will was executed Harry Koester, Deitrich Korfhage, J. E. Seary, Louis Kutzbach and myself; that at the time Louis Kutzbach made what purports to be his will I believed him to be of sound mind and memory; the words Herman Buse, on the will, is my signature, and the signature just above it is that of Harry Koester; Louis Kutzbach signed the will by mark when I was standing right on his bedside, and Harry Koester was standing right beside me; the will was written by J. E Seary; I saw Harry Koester sign his name and expect he saw me sign my name; I signed the will on a little table two or three feet from

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the bed on which Louis Kutzbach was resting with nothing between us.

Dr. W. C. Payne, who lived at New Holland, a village five miles from the home of the decedent, had some acquaintance with Louis Kutzbach prior to his last illness and visited him seven times during the three days immediately prior to his death. The will was made about noon on Tuesday, November 13, 1917. Dr. Payne visited Louis Kutzbach between ten and eleven o'clock in the morning and again about nine o'clock in the evening of

this day, and gives as his opinion and judgment that the testator was of sound mind on the occasions of these visits.

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Rev. M. H. A. Guemmer testified that he was a minister of the Evangelical Lutheran Church at New Holland; that he knew Louis Kutzbach for years before his death, but did not see him very often up to July 1917; that witness got "acquainted with him good last July during the sickness of his father;" talked with Louis during his father's illness; after July saw him maybe once a month; was at Louis Kutzbach's house on Sunday, Monday and Tuesday prior to his death;

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did not talk much with him on Sunday, but on Monday had a long talk with him; was there maybe an hour and a half; had a long talk with him on Tuesday afternoon at the time Dr. Butler was there; talked most about spiritual things, administered comfort to him and gave him communion, and that on Tuesday morning witness considered Louis Kutzbach a man of sound mind—always considered him a man of sound mind and a man of ordinary intelligence.

J. E. Seary testified that he went to the home of Louis Kutzbach on the occasion of drafting the will; that he wrote all the will except the signature of the witnesses and the printed part; that he read the will to Louis Kutzbach in the presence of Korfhage, Koester and Buse; asked Louis Kutzbach if that was the way he wanted it, and he said yes; I signed the will as a witness to his signature and the other witnesses signed it in the same room by the bed on a little table.

To justify an order admitting a will to probate, under the statute above quoted, it was only necessary that the particular facts therein specified be established. These facts relate solely to the execution of the will (without fraud, compulsion or other improper conduct,) in the presence of two or more witnesses, and the proof of such due execution by the oath or affirmation of two or more attesting

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witnesses that they believed the testator to be of sound mind and memory at the time of the execution thereof. (Claussenius v. Claussenius, 179 Ill. 545 (551); In re Will of Ingalls, 148 Ill. 287 (294-5).

In re Mary A. Kohley, deceased, 200 Ill. 189, the Supreme Court, having under consideration the proof neces-

sary in order that a will be admitted to probate, say that "to entitle a will to be admitted to probate four things must be proved: The will must be in writing and signed by the testator, or in his presence by some one under his direction; it must be attested by two or more credible witnesses; two witnesses must prove that they saw the testator sign the will in their presence or that he acknowledged the same to be his act and deed; they must swear that they believe the testator to be of sound mind and memory at the time of acknowledging the same."

The proof of the execution of the will in this case complies with the requirements of the statute and the holdings of the Supreme Court, and was sufficient to admit the same to record. The Circuit Court erred in not admitting it, and for that error the judgment will be reversed and the cause remanded with directions to admit the will to record.

Reversed and Remanded with directions.

17.30

GEN. NO. 6891. APRIL TERM A. D. 1918 AG. NO.41.

MABEL WRIGHT, Appellee.

vs.

OYER WRIGHT, Appellant.

212 I.A. 673

Appeal from the Circuit Court of Morgan County.

Opinion by WAGGONER, J.

The appellee, Mabel Wright, filed a bill for divorce in the Circuit Court of Morgan County against Oyer Wright, the appellant, charging him with having committed adultry with one Faye Roberts, and asking that the marriage between appellee and appellant be dissolved; that appellee have the care and custody of their one child and be decreed alimony. To such bill appellant filed an answer denying each allegation in reference to such charge. The case was tried by a jury, which returned a verdict finding that appellant had been guilty of adultry as charged in the bill of complaint. The court entered a decree granting a divorce, giving appellee the care and custody of the child, from which decree the appellant prosecutes this appeal.

The controlling question of fact presented for determination is, did the appellant commit adultry with Faye Roberts on the evening

of November 9, 1916, in the home of Fred Patterson, a druggist, in the Village of Franklin, Illinois, at a time when Patterson and his wife were at the drug store. The parties to this cause, together with their daughter, lived in Franklin not far from the Patterson home and store.

Appellee, in brief, testified that she and her husband had trouble over Faye Roberts; that they separated on her account and lived apart two weeks, when she returned to her husband on account of their child; that she remonstrated with her husband on account of the attention he paid to Faye Roberts, the time spent in her company and of his conduct when with her; that her remonstrances were unheeded by her husband, who announced his intention to be with Faye Roberts whenever he pleased; that he was with her every evening during the summer; that he was guilty of undue familiarity with her when they, together with other people of the village, were bathing in a nearby reservoir; that on the evening of November 9, 1916, she watched her husband, saw him speak to Faye Roberts, who was

standing on the street in front of Patterson's drug store, directly opposite Patterson's home; that in a few minutes Faye Roberts went across the street and on to Patterson's porch; that appellant went around the back way through an alley and into Patterson's home. After fifteen or

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twenty minutes appellant came out of the house, and as he went through a gap into the alley appellee grabbed him and said, "I have caught you at last;" that appellant jerked away and ran; that appellee went immediately to the store of the husband of Faye Roberts and told him what had occurred in the presence of his wife, who at the time was pale and nervous; that appellant did not return to their home until the next week, when he came, got his clothes, and went away. Appellee is corroborated by other witnesses and by facts and circumstances shown on the trial.

Appellant's testimony, for the most part, is directly opposed to that of his wife. He and Faye Roberts each deny the charge of adultry. Appellant says he was not in the Patterson house on the evening mentioned. Faye Roberts admits she went to Patterson's house that evening about the time in question, says she went to the toilet, but the evidence shows there is no toilet in the house.

A number of witnesses, who were at the reservoir at times when appellant and Faye Roberts were there, say they saw no acts of impropriety between them. Witnesses, called by appellant, who saw Faye Roberts at the store of her husband, at the time mentioned by the appellee, deny that she (Faye Roberts) was pale or nervous, and say they saw nothing unusual about her appearance. Appellant claims

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he was in and around some of the places of business and on the streets in the village up to the time his wife went to Roberts' store, and in this is corroborated by various witnesses called for that purpose.

The evidence was conflicting. Either appellee and at least three witnesses called by her, or appellant and Faye Roberts knowingly and wilfully testified falsely. The credibility of the witnesses and the weight of the testimony were questions for determination by the jury. The jury saw the witnesses and observed their manner while testifying, and were better able to determine

which were the more worthy of belief than an appellate court. The trial judge saw and heard the witnesses and approved of the verdict of the jury. In that state of a record this court will not disturb the verdict unless it is manifestly against the weight of the evidence, which is not the case here. Healea v. Keenan, 244 Ill. 484, at 488; French v. French, 215 Ill. 470, at 473.

A verdict will not be disturbed as being unsupported by the evidence unless it is against the manifest weight of the evidence. Hindle v. City of Joliet, 200 Ill. 160.

It is urged that the court erred in giving appellee's first and second instructions. By the first instruction the jury were told "that adultry may be proven by circumstantial evidence, and if the

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evidence * * * and inference arising from the acts of the parties * * * produces in your mind a presumption of cohabitation and unlawful intimacy, between the defendant and Faye Roberts * * * then such evidence would establish the charge of adultry;" and, by the second instruction, were further told that "the law is that the act of adultry would be proved by circumstances which raise the presumption of cohabitation and unlawful intimacy." Each of these instructions are correct statements of the law in cases where there is evidence of cohabitation and unlawful intimacy. (Stiles v. Stiles 167 Ill. 576, at 604.) The only evidence in this case was with reference to the charge of a single act of adultry with no pretense of cohabitation. Neither of these instructions should have been given for the reason that they were not applicable to the facts, but we do not regard it our duty to reverse the decree in this case on account of these two instructions, in view of the fact that the jury were correctly instructed in regard to the proof that must be made in order to establish the charge of adultry by seven other instructions given on taht subject.

The remarks made by counsel for appellee when addressing the jury were improper. No objection was intreposed to any remark, except one, and the court admonished counsel for making it. A party litigant can only complain where he has objected, and obtained a ruling,

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or if the court refuses to act. City of Salem v. Webster, 192 Ill. 369, at 376.

In conclusion, we think the decree should be sustained, and affirm it.

Affirmed.

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GEN. NO. 6894. APRIL TERM A. D. 1918. AG. NO. 44.

212 I.A. 673

JAMES A. McADAMS, Appellee

vs.

CHICAGO and ALTON RAILROAD COMPANY.
Appellant.

Appeal from the Circuit Court of Sangamon County.

Opinion by WAGGONER, J.

The appellee, James A. McAdams, brought an action on the case to recover damages for personal injuries received October 2nd, 1916, in a collision between an automobile he was driving and a switch engine, with two cars, upon the track of appellant at Auburn, Illinois.

The declaration contained one count charging that defendant was a railway company with a line passing through Auburn and across a public highway in that city, and was operating a switch engine on its tracks; that plaintiff was driving an automobile on the highway and attempted to cross defendant's tracks at such crossing; that defendant carelessly and negligently operated said switch engine and cars at a high and dangerous rate of speed, wholly failed and neglected to give some warning on approaching said highway crossing, and while plaintiff was atempting to cross the tracks in an automobile, the switch engine and cars were carelessly and negligently

run against the automobile and plaintiff was injured. A plea of general issue was filed, and the case was tried with a jury, which returned a verdict of $3000.00 for the plaintiff. A motion for a new trial was overruled. Judgment was rendered on the verdict, and defendant appealed.

The evidence shows that the tracks of appellant run through Auburn in a northeasterly and southwesterly direction, but nearer to the north than the east. Fourth Street in Auburn runs north and south on the west side of the tracks. VanBuren Street runs east and west intersecting Fourth Street and crossing the tracks. From the intersection of Fourth and VanBuren Streets it is about one-half a block east to the tracks. On the south side of VanBuren Street, east of and adjoining the tracks, are stockyards. On the north side of VanBuren Street, west of and adjoining the railroad right of way, is a shed, between which shed and the corner of Fourth Street is a fence covered with vines. On the west edge

of the right of way is a dismounted boxcar used as a tool shed.

The appellee, with William Smith, sitting in the front seat of the automobile, and John Pool in the back seat, were going from Springfield to the home of Pool's father south from Auburn on a hunting trip. The automobile was a four passenger, four-cylinder model of 1912 or 1913, weighing about five thousand pounds, borrowed by appellee

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from Mrs. Jennie Meeker, driven by him a good deal and with which he was thoroughly familiar. He had driven it practically all the day before. The brakes, clutch and car were in good condition. Dr. Conlin was going on the hunting trip, and was in a car immediately behind the car driven by appellee. At the crossing in question are located four tracks. The engine, with two boxcars, was backing from the north on the second track from where appellee approached the crossing from the west. Appellee had come south on Fourth Street, and at its intersection with VanBuren Street turned east. It was one-half a block from this corner to the railroad crossing, and as they turned Pool told appellee there was a train due from the south. Appellee testified that he was driving six or eight miles an hour as they approached the railroad crossing; he looked as far north as he could see, which was not far on account of the obstruction; that his hearing was good; that he heard no signals; that he looked south for the train Pool had said was due; that just about the time they reached the first rail of the first track he looked back to the north, saw the engine with two boxcars backing on the second track; that he heard no warning being sounded; that the train was then about two cars length north of him, and was approaching very rapidly; that a brakeman was in the stirrup on the southeast corner of the boxcar; that he did not see the brakeman give any signals, but did see him drop off; that his

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(appellee's) first impression was that he could not get across the tracks, so he at once threw out the clutch, applied the foot-brake, grabbed for the emergency brake, but the automobile did not stop before getting on the track; that the boxcar struck the automobile, rolled and dragged it south about one hundred feet. Appellee testified that he was pinned under the wreck, but was not unconscious; that he hear a man come by and

say, "Start her up, they are both dead;" that the train was then backed from six to ten feet, dragging the wreck, rolled them over, and pinned him down tighter than ever on his face. William Smith was killed. Dr. Conlin testified that John Pool suffered from aphasia as a result of the accident, and had no recollection of what occurred. Appellee had both legs broken at the ankles, three ribs broken, received an injury to his left kidney, and his face was lacerated. He was in a hospital six weeks and unable to work for more than three months. He is twenty-eight years old, employed in the postoffice at Springfield, Illinois, at a salary of $1100.00 a year. His hospital and doctor bills amounted to $393.25.

Valerin Semkus testified that he was near the crossing a block north from the place of the accident, and saw the engine when it was within one hundred feet of the automobile; that the train was going from twenty to twenty-five miles an hour; no whistle was sounded and no bell was ringing. Dr. Conlin, following in a car just behind

appellee, testified appellee was driving from eight to ten miles an hour when approaching the crossing; that the train was going twenty or twenty-five miles an hour, and that he heard no whistle or bell. Joseph Snyder testified that he was on Fourth Street one-half a block west and one block north from the place of the accident; that the train passed him going south and he heard no bell or whistle. Daniel Murphy, who was waiting for a train at the depot four blocks north from the place of the accident, testified that he saw the engine and two cars pass the depot going south and running twelve or fifteen miles an hour.

Appellant called the conductor, engineer, fireman and two brakemen, who were operating the train, each of whom testified that the train was running from eight to ten miles an hour and that the bell was ringing. Nine other witnesses, called by appellant, also testified that the bell was ringing, and two others that the train was running slow. L. C. Stade, Safety Appliance Inspector for Illinois, testified that from a point in Van-Buren Street twenty-five feet west from the tracks in question, a person can see by the southeast corner of the dismounted boxcar for a distance of amout one block north or from two hundred and seventy-five to three hundred feet; that at a point twenty-three feet west from the track in question, a person can see up the track beyond the depot a quarter of a mile.

The brakeman, who was on the end of the boxcar, testified that when he saw the automobile it was forty or forty-five feet north from the crossing; that he dropped off the car and gave the engineer a stop signal; that the train was going eight or ten miles an hour; that the bell was ringing, and that the automobile was moving kind of fast.

Appellant contends, (1) that there was no evidence of due care on the part of appellee, or of negligence on appellant's part; (2) that the overwhelming weight of the eivdence is that there was neither negligence on the part of appellant, nor due care on appellee's part; (3) that certain instructions, given for appellee, were erroneous, and, (4) that an instruction, asked by appellant and refused, should have been given.

Whether there was any evidence fairly tending to establish due care on the part of appellee and negligence on the part of appellant is a question of law. Voight v. Anglo-American Provision Co. 202 Ill. 462 (465); Reiter v. Standard Scale Co. 237 Ill. 374 (380); Variety Manufacturing Co. v. Landaker, 227 Ill. 22 (24-5).

Ordinarily the questions of negligence and contributory negligence are questions of fact, and only become questions of law when from the undisputed facts reasonable men must arrive at the same conclusion. Ward v. C. and N. W. Ry. Co. 165 Ill. 462 (464); Cicero

St. Ry. Co. v. Gemmill, 209 Ill. 638 (641); Cicero St. Ry. Co. v. Meixner, 160 Ill. 320 (321-2); Wabash Ry. Co. v. Brown, 152 Ill. 484 (488).

Appellant's contentions amount to this, that because appellee when at a point twenty-five feet west from the place of the collision, could have seen up the track two hundred and seventy-five or three hundred feet, that he should have seen the approaching train, and a failure so to do was negligence on his part. Appellee was not, under all circumstances, required to stop, look and listen, and a failure so to do was not of itself contributory negligence. He was required to use such care as a person of ordinary prudence would exercise under like circumstances, and it is usually for the jury to determine, in view of all the surrounding circumstances, whether failure to look and listen constitutes negligence or lack of due care. Winn v. C. C. C. and St. L. Ry. Co., 239 Ill. 132 (139.) We cannot say that, under the circumstances disclosed by the record in this case, there was no

evidence fairly tending to establish due care.

The testimony in reference to the rate of speed of the train was conflicting, and the rate of speed and whether or not it was negligence were questions of fact for the jury to determine. E. J. & E. Ry. Co. v. Raymond, 148 Ill. 241 (249.) Whether or not the bell was ringing and whether a failure to ring it was negligence were also questions of fact for the jury. Galena and Chicago Union R. R. Co.

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v. Dill, 22 Ill. 265 (271-2.)

From the facts proven it would be idle to argue that there is no evidence in the record fairly tending to establish due care by the appellee and negligence by the appellant. There was no error in refusing to direct a verdict for the defendant.

Whether the verdict is clearly and manifestly against the weight of the evidence is a question of fact. Voight v. Anglo-American Prov. Co. 202 Ill. 464 (465;) I. C. R. R. Co. v. Smith, 208 Ill. 608 (620.) This court will not disturb a verdict of a jury unless such verdict is clearly and manifestly against the weight of the evidence. Chicago City Ry. Co. v. McClain, 211, Ill. 589 (596;) Utter v. Merkle-Wiley Broom Co., 158 Ill. App. 182 (184.) When the evidence is conflicting it is properly left to the consideration of the jury, and in such a case we will not disturb the verdict, unless we can see that it is manifestly against the clear weight of the evidence. T. W. and W. Ry. Co. v. Harmon, 47 Ill. 298 (303); St. L., J. and C. R. R. Co. v. Terhune, 50 Ill. 151 (152-3). A verdict based on conflicting evidence and approved by the trial court is not to be lightly disturbed. City of Pana v. Baldwin, 265 Ill. 119 (122;) Compher v. Browning, 219 Ill. 429 (451.) The evidence on the question of negligence and contributory negligence was conflicting, and we cannot say the verdict was clearly and manifestly against the weight of it.

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By appellee's first instruction the jury were told that if they believed, from the greater weight of the evidence, that plaintiff had proven "the material allegations of his declaration," they should find defendant guilty. This instruction was erroneous. Devine v. Chicago City Ry. Co., 262 Ill. 484 (491.) But, as appellant concedes, it is hardly reversible error. The instruction should be treated as a series. Defects in instructions given on behalf of the plaintiff may be cured

by those given for the defendant. Moore v. Aurora, Elgin and Chicago Ry. Co. 246 Ill. 56 (60.) The defect complained of is that the jury would not necessarily know which were the material allegations of the declaration. The first and second instructions, given for appellant, clearly explained that the plaintiff must prove due care on his part, negligence on the part of the defendant, as charged, and that such negligence was the proximate cause of plaintiff's injuries. These two instructions, together with others given for appellant, corrected the error complained of.

Complaint is made of appellee's second instruction, by which the jury were told that the plaintiff had a right to rely upon the operation of trains upon the tracks of the railway company in such a manner as to comply with the law: that there would be a warning given of the approach of a train; that a train would not be operated at a

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high and dangerous rate of speed, and that in determining whether plaintiff was exercising due care the jury had a right to take into consideration that he could rely on the defendant to perform its obligation in this behalf. Appellant concedes this to be a good instruction in cases where the declaration charges a violation of a specific duty imposed by a statute or ordinance. Colleson v. I. C. R. R. Co., 239 Ill. 532 (538;) Henry v. C. C. C. and St. L. Ry. Co., 236 Ill. 219 (222-3;) Dukeman v. C. C. C. and St. L. Ry. Co., 237 Ill. 104 (107-8); B. and O. S. W. Ry. Co. v. Then, 150 Ill. 535 (537). It is true that all the foregoing cases seem to be where the rule was applied to a charge of a violation of a specific duty, but we find nothing limiting the rule to such cases.

Independent of any ordinance it was the duty of appellant, at common law, to regulate the speed of its trains with proper regard to the public safety. Overton v. C. and E. I. R. R. Co., 181 Ill. 323 (326); E. J. and E. Ry. Co. v. Lawlor, 229 Ill. 621 (629); Partlow v. I. C. R. R. Co., 150 Ill. 321 (325); Heidenreich v. Bremner, 260 Ill. 439 (447-8, 451-2). Appellant was bound to use ordinary and reasonable care to avoid accidents in running its trains forward or backwards. I. C. R. R. Co. v. Larson, 152 Ill. 326 (331). It was also appellant's duty, without regard to a statute or ordinance, to give notice of the approach of its trains to all points of known or

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reasonably apprehended danger. C. and A. R. R. Co. v.

Dillion, 123 Ill. 570 (579-80); C. and A. R. R. Co. v. Sanders, 154 Ill. 531 (536). Appellee "knew, or is supposed to have known, that the law required the company to ring the bell or sound the whistle, and knowing that to be its duty, had a right to rely upon its performance. On hearing no such signal his attention was not attracted to his peril, but its omission was highly calculated to lull him into a fatal belief of security." St. L. V. and T. H. R. R. Co. v. Dunn, 78 Ill. 197 (200). The criticism that this instruction leaves the jury to determine what the common law duties are, with reference to the operation of trains, is a strained view of the subject. "Instructions should always be construed in the light of the issues being tried and the proofs offered in support of them. When thus construed, we find no objection to the instruction in question." C. and A. R. R. Co. v. Dillion, 123 Ill. 570 (578-9). The only issue, in this respect, was as to the speed of the trains and warning of its approach to the crossing where the accident happened. The instruction told the jury that appellee might rely that a warning would be given and that a train would not be operated at a high and dangerous rate of speed. Appellee undoubtedly had a right to assume that appellant would obey the law in this respect, and it was not his duty to anticipate any negligence on the

part of appellant. Henry v. C. C. C. and St. L. Ry. Co. 236 Ill. 219 (221-3): Heidenreich v. Bremner, 260 Ill. 439 (451-2 and 447-8); Long v. Chicago Ry. Co., 181 Ill. App. 654 (657); Stock v. E. St. L. and S. Ry. Co., 152 Ill. App. 613 (617).

Appellee's fourth instruction is criticised as permitting the jury to consider facts and circumstances, not in evidence, in determining the weight of the testimony. This instruction is poorly worded, but we do not understand it as permitting the jury to go outside the evidence, but on the contrary to confine them to "the facts and circumstances in evidence."

Appellant's instruction, numbered twenty and refused, attempts to direct a verdict on a state of facts therein set forth relative to appellee's ability to have seen the train if he had looked. This instruction was properly refused for the reason that it directly invaded the province of the jury. It was for the jury to determine the question of contributory negligence. No rule

can be stated by which the question of contributory negligence can be determined. It can not be said that a failure to look and see an approaching train is, of itself, contributory negligence. Winn v. St. L. Ry. Co. 239 Ill. 132 (139).

We find no reversible error in the record in this case and therefore affirm the judgment appealed from.

Judgment affirmed.

can be stated by which the [illegible] of [illegible] negligence can be determined. It can not be said that the failure to [illegible] and see [illegible] of the self, contributory negligence. When [illegible] 239 Ill. 132 (1909).

We find no reversible error in the record in this case and therefore [illegible] the judgment of the [illegible] court.

Judgment Affirmed.

175a

GEN. NO. 6897. APRIL TERM A. D. 1918. AG. NO. 47.

FABER-MUSSER COMPANY, Appellant

vs.

212 I.A. 674

WM. E. Dee MANUFACTURING CO. Appellee

Appeal from Sangamon County Circuit Court.

Opinion by WAGGONER, J.

This is an action of assumpsit brought by the appellant, Faber-Musser Co., against the appellee, Wm. E. Dee Manufacturing Co. The declaration consisted of a special and common counts. The special count charged appellee with failing to deliver a large quantity of fire brick according to the terms of an alleged written contract set up in the special count. The alleged contract was in the form of an order and letter attached together bearing date May 14th, 1917. Both the order and letter were addressed to Wm. E. Dee Mfg Co., and each was signed by the Faber-Musser Co. At the bottom of the letter, following the signature of the appellant appear the words, "accepted Wm. E. Dee Mfg. Co., per Mathew M. Dee." The appellee filed special pleas, verified, denying the making and delivery of the alleged contract. At the close of appellant's evidence, appellee entered a motion to direct a verdict, the motion was allowed and verdict directed.

The evidence shows that Mathew M. Dee was a travelling

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salesman and solicitor for the appellee; that he had solicited business from the appellant; that the appellant by letter of April 18th, 1917, requested the appellee's agent to quote prices on fire brick, which such agent did, and in response to a telephone call from appellant went to Peoria, Illinois; that on May 14th, 1917, the order in question was prepared in duplicate in appellant's office in Peoria; that a carbon copy was signed, under the word "accepted", by the agent writing the words, "Wm. E. Dee Clay Mfg. Co., per Mathew Dee"; that the carbon copy, with such acceptance written thereon, was retained by the appellant; that the original did not have the acceptance written on it; that the original was delivered to the agent and by him sent to appellee at its principal office in Mecca, Indiana. The appellee on May 16th, 1917, by letter, refused to accept the order. There were subsequent negotiations and correspondence in which appellee always referred to the

writing of May 14th as an order and in which the appellant so referred to it until in the latter part of the correspondence when appellant began to call it a contract. Appellee is an Illinois corporation with its plant located at Mecca Indiana. Mathew M. Dee had an office at Springfield, Illinois; solicited orders which he sent to Mecca to be filled.

The appellee contents that Mathew M. Dee was a mere solicitor and had no authority to sign contracts in its name. Appellant insists that appellee ratified the contract by its correspondence. There

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can be no ratification of an unauthorized act of an agent unless the principal has full knowledge of what the agent pretended to do. (Sill v. Pate, 230 Ill. 39 (49). In this case appellee did not know that Mathew M. Dee had purported to accept the order for the reason that the copy, with the acceptance, was retained by appellant, while the copy forwarded to appellee had no acceptance on it. Appellant has therefore failed to prove a ratification.

The question here is not one of agency but of the extent of authority of an agent. The only evidence tending to show the extent of the authority of the agent was that he was a travelling salesman or solicitor. Under the law, a travelling salesman or solicitor has authority to do nothing other than solicit orders and submit them to his employer for acceptance or rejection. (Currie v. Syndicate Des Cultivators etc., 104 Ill. App. 165). The evidence with all inferences that can be legitimately drawn therefrom only shows that Mathew M. Dee was a solicitor of orders, and that, as a matter of law, does not show he had authority to execute contracts for appellee. The trail court properly directed a verdict for appellee.

There are other reasons why this case should be affirmed. The abstract does not show a judgment. The only attempt to show a judgment is at page twenty where, in abstracting the bill of exceptions, it appears (with reference to the motion for a new trail), "Motion overruled and judgment upon the verdict, February 14, 1918". It was

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said in Flanningham v. Hogue, 59 Ill. App. 315, at 318, "It does not show what the judgment was, and if it did, that did not suffice. A judgment is a part of the record proper, and cannot be shown by a bill of exceptions. Looking, therefore, at the abstract al-

one, it does not appear that there was any judgment against the plaintiff in error, for the rendition of which he has assigned error."

The "abstract must, as against the appellant, be deemed to be sufficiently full and accurate to present all the errors on which it now relies." (Chicago, Pacific & St. L. Ry. v. Wolf, 137 Ill. 360 (364); Wabash Railroad Co. v. Smith, 58 Ill. App. 419 (421). Words like "judgment" or judgment on finding" are a mere index, and do not furnish material upon which to base grounds for reversal. (Ammudson Printing Co. v. Empire Paper Co., 83 Ill. App. 440; Gilbert v. Sprague, 88 Ill. App. 508 (511); Lewinshon v. Stevens, 70 Ill. App. 307.

If a contract between appellant and appellee had been established by the evidence, there is no proof of damages sustained by appellant, and if the case had gone to the jury, in the state in which the record appears, the verdict could only have been for nominal damages. This court will not reverse a case merely for the purpose of permitting a recovery of nominal damages. (Thisler v. Hopkins, 85 Ill. App. 207 (212); Meyer v. Jusc Goodell & Co., 32 Ill. App. 328 (330); Comstock v. Brosseau, 65 Ill. 39 (44). The maxium deminimis non curat lex, is

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controlling. (Chicago, Wilmington & Vermillion Coal Co. v. Streator, 172 Ill. 435; Village of Morgan Park v. Knoph, 11 Ill. App. 571 (574). A number of questions were asked in reference to damages, to which objections were sustained. If the appellant wished to preserve a right to have determined in an appellate court whether or not there was error in sustaining the objections, an avowal should have been made as to what was excepted to be proved by the witness by any particular questions or series of questions. Unless such an avowal was made, it would not appear that appellant had been injured for the reason that the answer of the witness might have benefitted the appellee. (Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562 (565); Geringer v. Novak, 117 Ill. App. 168; McLod v. Andrews & Johnson Co., 116 Ill App. 646 (648); Maxwell v. Habel, 92 Ill. App. 510 (512).

The trail court did not err in directing a verdict for the defendant.

Judgment affirmed.

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GEN. NO. 6905 APRIL TERM A. D. 1918. AG. NO. 53.

W. B. LINN, Appellant.

vs.

GEORGE SPENSE & CO., Appellee.

212 I.A. 674

Appeal from Circuit Court of Clark County.

Opinion by WAGGONER, J.

The appellant, W. B. Linn, brought an action in assumpsit against the appellee, George Spence, for damages for a breach of a contract for the purchase of an automobile. A plea of general issue was filed. The case was tried by a jury. The jury returned a verdict for the appellee, judgment was rendered thereon, and appellant brings the case here by appeal.

The appellant testified that on December 26, 1916, he met appellee on a train, and after some conversation, signed an order for an Overland Country Club Roadster automobile, cost $695.00; that he gave his check for $100.00 on the Martinsville State Bank, and that indorsed on the check was a notation "for Country Club Car, credit $500.00 on old car, total $695.00;" that Spence took the check and order and agreed to take his (appellant's) old car at $500.00 if the old car was all right that the appellant was to pay the freight on the new car; that three days afterwards appellant took the old car

to the appellee's place of business and that the appellee said it was all right; that on February 27, 1917, appellant went with R. E. Wilson to the appellee's place of business and requested to see the check; that the check was by appellant and Wilson inspected; that appellee said he thought the freight would be about $20.00; that appellant made a tender in gold of $115.00 to appellee, demanded the new car, and the appellee refused to take the money; said he would not let appellant have the new car; for appellant to take the old car and his check and get out; that appellant laid the check on the fender of a car and put the gold in his pocket; that appellant afterwards bought the same kind of a car which had increased in price $100.00. The appellant was corroborated by Wilson as to the notation on the check. It was proven that appellee burned the check after the appellant left his place of business; that the second hand car was run into the street and taken into the garage of C. T. Briscoe, where it has remained.

The appellee, Spence, testified that in the latter part of December 1916, he met appellant on the train; that he described a Country Club Roadster to appellant; told him that the price was $695.00, but that the deal had to be closed that day as the price would advance the next day; that appellant said that if he could sell his old car he would buy a new one; that he ought to have $500.00

for his old one; that appellee offered to help appellant sell it; told him if he did not sell it he would not have to take the new car; that appellant wrote a check for $100.00; made a notation on the check that it was to apply on an Overland Country Club Roadster, and that the balance was $595.00; that an order was written out to the same effect; that afterwards appellant came to appellee's place, wanted to see the check, and appellee handed it to Linn, who called Wilson's attention to it; that Linn put out some gold and said that will make the check good; that appellant handed the check to appellee; appellee refused to take it, laid it on the fender of a car; that appellee told Linn to take his check, his old car and get out; that appellee never promised to give Linn $500.00 for his old car, never promised to give the new car for the old car and $195 plus the freight; that after the check was laid on the fender he (appellee) burned it. Appellee's stenographer corroborated him as to the notation on the check, but did not know the bank the check was on, or who was the payee; was not sure of the date, and not positive as to the substance of the notation.

In this case the evidence was very close and it was highly important that the jury be correctly instructed. (West Chicago Street R. R. Co. v. Doughtery, 170 Ill. 379 at 382; C. B. &. Q. R. R. Co.

v. Appell, 103 Ill. App. 185 at 187)

Appellee contends the court properly refused appellant's first refused instruction for the reason that it required the jury to **"find** from a preponderance of the evidence" instead of a **"believe"** from a preponderance of the evidence. It has been held that an instruction requiring the jury to "find from the evidence" is proper. (Ill. Central R. R. v. Warriner, 132 Ill. App. 301, at 309; Chicago & Eastern Ill. R. R. v. Pittman, 185 Ill. App. 481, at 487.)

Appellee gives as a further reason why the above

mentioned instruction was properly refused, that he could not be compelled to take the second hand car unles it was accompanied by a tender of all the purchase money, including freight; and only when appellant had fully complied with his part of the contract as a condition precedent to a right to recover damages for a breach of it. This is not a case of tender in payment of a debt, but of a tender in the sense of an offer to perform a contract. The conditions of the contract were mutually concurrent and dependent conditions and full performance by the appellant was not a condition precedent to performance by the appellee. All appellant was required to do was to tender performance, that is, to prove his readiness, ability and willingness to perform his part of the contract.

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Appellant says appellee told him the amount of the freight was $20.00, and appellee when testifying does not deny so doing. Appellee had accepted appellant's check for $100.00; had satisfied himself that the second hand car was in good condition, so all that remained for appellant to do was to pay $95.00 and the freight. When appellant was told the freight was about $20.00, he offered appellee $95.00 and $20.00 making $115.00, in gold, and was told by appellee to take his check, his old car and get out. The evidence tends to show that appellant did all that was in his power to do to show his readiness, willingness and ability to perform his part of the contract, and what he did was sufficient. The statement made by the Supreme Court in the case of Osgood v. Skinner, 211 Ill. 229, at 235, is applicable here: "We are also of the opinion that the offer to perform the contract was sufficient. The transfer of the stock and the payment for the same were intended to be mutual and concurrent acts, and it was not contemplated that either party should perform some act as a condition precedent to the act of the other. If a contract calls for successive acts, first by one party and then by the other, there is no breach by one if the precedent act has not been performed by the other; but if the contract contemplates concurrent acts, it is sufficient to put one party in default that the other party is ready, willing and offers to perform

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his part of the contract. A tender, as applied to such a case, does not mean the same kind of offer as the tender of money in payment of a debt, where

the money is offered to the creditor unconditionally and the transaction is completed and ended. It means an offer accompanied with ability to do the act required of one party provided the other will concurrently do what he is required to do. (Clark v. Weis, 87 Ill. 438; Manistee Lumber Co. v. Union Nat. Bank, 143 id. 490.) There must be an actual tender or offer to perform unless the other party has refused to perform when an actual offer need not be proved and a mere readiness and willingnes to perform is sufficient."

The sixth instruction given for the appellee was erroneous and the Court also erred in refusing to give appellant's first refused instruction.

For the errors above indicated, the judgment of the Cicuit Court will be reversed and the cause remanded.

Reversed and remanded.

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GEN. NO. 6908 APRIL TERM A. D. 1918. AG. NO. 56.

WILLIAM M. RILEY, Appellee.

vs.

F. A. JORGENSEN, ET ALS, Appellants.

212 I.A. 674

Appeal from the Circuit Court of Douglas County.

Opinion by WAGGONER, J.

This is an action in assumpsit instituted by appellee, William M. Riley, against the appellants F. A. Jorgensen, C. P. Jacobson and E. M. Perry. The declaration contains a special and common count for use and occupation. A demurreer was filed to the declaration, the first count amended, the demurrer refiled and overruled. The defendants elected to stand by their demurrer, were defaulted, and judgment was rendered against them for $300.-00 and cost. Defendants bring the case here by appeal.

One good count in a declaration is sufficient to sustain a verdict, notwithstanding other counts are defective. (Hurd's Statute 1917, Chapter 110, Sec. 78; North v. Kaizer, 72 Ill. 172 (176); Gebbie v. Mooney, 121 Ill. 255 (256-7.) If one count of the declaration, under consideration, is sufficient, this case should be affirmed.

It is not necessary that the common counts describe the premises. (12 Encl. Pl. & Pr. pg 852, Title, Landlord and Tenant.) While

it is true that the common counts should show a promise and should allege that the defendants "undertook and faithfully promised" etc., yet the better practice would require that the defendants point out this objection by special demurrer (Chitty on Pleadings pg 300-4) which was not done in this case.

However, in the view we take of it the special count is good. Where a tenant remains in possession after the expiration of the term of the lease without a new contract, it is optional with the landlord to treat him as a trespasser, or to waive the wrong of holding over and treat him as a tenant; and if the landlord accepts rent from the tenant, an election is made and a tenancy from year to year created upon the same terms and subject to the same rent * * * as is contained in the lease. (Goldborough v. Gable, 140 Ill. 269 (273); same case, 152 Ill. 594 (596-7); Clinton Wire Co. v. Gardner, 99 Ill. 151.

The special count alleges that the plaintiff on Feb-

ruary 19th, 1915, demised certain described premises to the defendants for a year from March 15th, 1915, to March 15th, 1916, at a rental of $300.00 per annum, payable March 1st, 1915; that said rent was paid and the defendants entered into possession, and without further agreement continued in possession for the year March 15th, 1916 to March 15th, 1917; that the plaintiff as- $300.00 rent on March 1st, 1916; that the defendants without any further agreement after March 15th, 1917,

continued in possession and thereby became tenants for the year ending March 15th, 1918, at a rental of sented thereto, and accepted from the defendants $300.00 per annum, and liable to pay said rental on, to-wit, March 1st, 1917; and being so liable promised to pay said sum on, to-wit, March 1st, 1917.

The first, or special count, clearly states a good cause of action by alleging facts that show a tenancy from year to year by holding over within the meaning of the rule as laid down in the foregoing authorities.

The Circuit Court did not err in overruling the demurrerr and in rendering judgment against the appellants.

Judgment affirmed.

178a

GEN. NO. 6913. APRIL TERM A. D. 1918. AG. NO. 59.

HENRY C. HAMILTON, Receiver.
Appellant,
vs.
A. N. REED,
Appellee

212 I.A. 674

Appeal from the County Court of Macoupin County.

Opinion by WAGGONER, J.

The appellant, Henry C. Hamilton, was appointed Receiver of the Bank of Palmyra, Illinois. The books of such bank contained an account with appellee, A. N. Reed, beginning November 11th, 1911, by his giving a check for $244.39, with nothing to his credit; that appellee afterwards made three deposits aggregating $247.50, and gave nineteen checks amounting to $516.41; the account was according to the books of the bank at all times overdrawn, and at the commencement of this suit the overchecks amounted to $268.92. This suit was brought to recover the amount last stated. To a declaration containing a special count and the consolidated common counts a plea of the general issue, with notice of set off, was interposed. A jury returned a verdict of $202.61 in favor of appellee on his plea of set off. Judgment was rendered on the verdict and an appeal taken to this court.

The evidence shows that on November 2nd, 1911, appellee sold to G. A. Sutton hay belonging to Isaac Crum, Lester Goode (who departed

this life prior to date of the trial,) and himself. G. A. Sutton gave appellee, in payment for the hay, his check on The Bank of Palmyra for $471.53. Appellee testified that about a year prior to the first part of November 1911, he had an account or transaction with the Bank of Palmyra; that in the early part of November 1911 he received a check for $471.53 from G. A. Sutton; took it to the Bank of Palmyra; talked to Charles A. Mahan and L. P. Smith; presented the check to them; Lester Goode, Isaac Crum, John Phoenix, two gentlemen that he was not acquainted with, and himself, were on the outside; that L. P. Smith (since deceased,) Jesse A. Smith, C. S. Mahan and Elmer Dikis were on the inside at the bank; that he handed the check to Mahan, who said that Sutton had no money in the bank; that he could not pay the check;

that he (appellee) told Mahan he had come to settle with Goode; that he wanted to settle with Goode for some hay he (appellee) had sold belonging to Goode, Crum and himself; that Mahan said you may leave the check, you may check for what you want and settle with Goode; Sutton has gone to Waverly today to collect some money; that he (Sutton) will probably bring in some money, and whatever he deposits or brings in we will put to your credit after this check is paid; that you can leave the check with us, and that appellee left the check. Appellee further testified that Mahan laid the check inside; that L. P. Smith stepped up and said, "Go (ahead) and check for what you want, Al;" that he (Smith) said he was satisfied that Sutton would bring in some money;

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that he (appellee) made a check to Goode for two hundred some odd dollars; that after they had thrown Sutton into bankruptcy, gotten his property, Mahan said, "Here's this check Mr. Sutton gave. It's no good. You just as well take it with you;" and that appellee replied, "No, I will leave it with you;" that on the day appellee received the Sutton check he had no deposit in the Bank of Palmyra; that he gave a check to Goode on said bank and that the bank cashed it.

Isaac Crum testified that he knew about the check given by Sutton to Reed in the early part of November 1911; was present in the bank when Reed presented the check for payment; heard a conversation in the bank between Mahan and Reed about the check; that Mahan told Reed that Sutton did not have any money in the bank; that he (Sutton) had gone to Waverly; would likely get some that day and get some in; that if he (Reed) would endorse the check, he could check out the money and draw some until Sutton put in enough to make the check good; that he (Crum) stood there and saw Mahan take the check; that Goode (now dead,) Phoenix, and likely another one or two were there; that he (Crum) owned part of the hay sold to Sutton and was expecting money out of the check; Reed drew a check to Goode; Mahan said that if Sutton would deposit the money to pay that check, he (Mahan) would pay it; Sutton was to deposit the money to take up the check.

John Phoenix testified that he remembered a time in the early part of November 1911, when Reed, Goode, and another gentleman were

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present at the Bank of

Palmyra, when he went in to get a bill changed; that he heard a conversation between Mahan, Smith and Reed about a check that Sutton had given Reed; Mahan said to Reed that Sutton had no money there, was behind with him or something of that kind; that if Reed would endorse the check and leave it, and if Sutton deposited any more money he (Mahan) would put it to his (Reed's) credit; Mahan told Reed to go ahead and check, it would be all right; think Smith said it would be all right or "Go ahead, Al."

G. A. Sutton was called by appellee to identify the check given by him to Reed and the Bank of Palmyra pass book being used by him in November 1911. Both were admitted in evidence without objection. The pass book showed deposits made by Sutton in such bank, November 11, 1911, $85.00, November 14th, $282.74, November 20th, $162.02, and on November 25th, $125.00 making a total of $654.76. On cross examination, without objection, appellant asked the witness about a conversation, and the witness testified that after the check was given he had a conversation in the bank with Mahan about its payment; that Smith was present; that they told witness that Reed was checking; that he (Sutton) would have to deposit enough money to take the check up, to make it good, and that he deposited twice the amount; that Reed came to him and reported and he (Sutton) went to see why they turned this check down, and that they said they turned it down

because there was no money there. The direct examination was confined to the identification of a check and pass book about which there was no dispute. The appellant by his inquiries, in relation to matters not touched upon in the direct examination, made this witness a witness for the appellant, and the cross examination is to be treated as evidence offered by appellant. (Chicago Exchange Building Co. v. Merchants Building Improvement Co. 83 Ill. App. 241; Ency. of Evidence, Vol. ,3 pg. 825.)

Charles A. Mahan testified appellee had no account at our bank at the time the Sutton check was presented; that he (Reed) had no account there and had not had for about a year previous; that November 11th, 1911, was the first item, a check for $244.39; when he gave this check he had no account there; he gave the check and I paid him; that he told appellee the bank would not pay him Sutton's check' handed it back, and that appell-

ee took it; that appellee then asked to leave the check, said he would probably arrange with Sutton about the matter, left it for safe keeping, and it has been laying around the bank ever since; that he did not tell him that Sutton had gone to Waverly that day and would probably bring back money to cover the check, or that he would credit the next deposits that Sutton made up to Reed's account until the check was paid; that he (Mahan) said nothing of that kind; that Sutton did not come to the bank and talk

with him (Mahan) about why he had not paid the check; that he handed the check back, refused to pay it on the ground that Sutton had no money in the bank to pay it with; that he never told Appellee that he would pay the check only on one condition, if he (Sutton) ever had any funds to pay it with of course he would have to pay it; that Sutton deposited in said bank in November 1911, a total of $654.00 and some cents; that he applied these deposits to discharge Sutton's overdrafts of seven or eight thousand dollars. which he (Sutton) owed the bank.

It is not claimed that either Jesse A. Smith or Elmer Dikis heard the conversation in reference to the Sutton check. If Mahan told appellee, in substance, to endorse and leave the Sutton check at the bank; to settle with Goode; to check for whatever he wanted, and promised to honor the Sutton check if the maker deposited sufficient funds to meet it, and if appellee did endorse and leave such check; and afterwards Sutton deposited money more than sufficient to pay such check, then appellee was entitled to recover. That Mahan did so state is testified to by appellee, Crum and Pheonix. It is true Mahan contradicts the testimony of each of them, as well as the testimony of Sutton in reference to a conversation had with him. The amount of the Sutton check presented to the bank for payment November 11th, 1911, was $471.53. It is shown that during the same month, and subsequent to the presentation of such check, Sutton deposited $654.76 in said

bank out of which the check in question could have been paid. The jury would not have been warranted in disregarding the testimony of the four witnesses and accepting that of Mahan.

Appellant objects to the fifth instruction, given on behalf of appellee, for the reason that it does not require the claim of set off to be sustained by a prepon-

derance of the evidence. In order to have been absolutely correct it should have embodied that requirement, but the jury had been told in other instructions, given by each party, that the set off must be proved by a preponderance of the evidence before they could allow it, and it was not error to omit such statement from this instruction. (Cary v. Niblo, 155 Ill. App. 338 (342.)

Appellant seeks to make a defense in this court to appellee's claim of set off that was not interposed in the County Court, and for that reason is unavailing here. (Johnson v. Johnson, 166 App. 422 (426.)

The judgment of the trial court should be and is affirmed.

Judgment affirmed.

Judgment : Barrett.

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GEN. NO. 6917. APRIL TERM A. D. 1918. AG. NO. 62.

VIOLA PRICE, Appellee.

vs.

212 I.A. 674

THOMAS R. PRICE, Appellant

Appeal from Circuit Court of Adams County.

Opinion by WAGGONER, J.

Viola K. Price, the appellee, filed a bill against her husband, the appellant, for seperate maintenance, charging him with extreme and repeated cruelty, with having on a large number of occasions cursed and applied to her vile names; with the use of vile and profane language in the presence of her and their children; with falsely accusing her of a want of chastity, and other misconduct on the part of the appellant, by reason of which she was obliged to leave their home and that at the time of the filing of her bill she was living seperate and apart from him without her fault.

Appellant answered the bill denying each and every allegation therein contained against him in reference to the matters above enumerated. The cause was heard by the court and a decree rendered finding that the allegations of the bill had been substantially proven, and granting the relief sought.

A reversal of the decree is urged on the ground that the evidence is insufficient to sustain it. That is the sole question

presented We would not feel authorized to disturb the findings and decree of the chancellor unless from a review of the evidence we were satisfied that the decree was so manifestly against and contrary to the weight of the evidence that it ought not to be allowed to stand. (Pinkstaff v. Steffy, 216 Ill. 409; Moneta v. Hoffman, 249 Ill. 69.)

The decree, in our opinion, is not against the weight of the evidence, but is supported by it, and is therefore affirmed.

Decree affirmed.

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